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No. 89- _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TODD PATTERSON

Petitioner,

—v.—

FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government and JOHN DOE AGENCY, an unknown agency of the United States Government

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether the provision of the Privacy Act, 5 U.S.C. 552(a)(e)(7), prohibiting a federal agency from maintaining records describing an individual's exercise of rights guaranteed by the First Amendment unless such maintenance is "pertinent to and within the scope of" an "authorized law enforcement activity" is satisfied by a showing that the record is merely "relevant to" a law enforcement activity without any finding that it is also "necessary"?

2. When a federal court finds that the public record demonstrates a genuine issue of material fact, does it violate fundamental principles of Due Process and the adversary system for the court to rely upon ex parte evidence presented in camera to

resolve the factual issue in the absence of a detailed showing of extraordinary circumstance?

3. Whether the United States Government may avoid liability for the unconstitutional acts of its agents in a suit for nonmonetary relief by refusing to reveal their identity, and thereby assert a lack of *in personam* jurisdiction?

LIST OF PARTIES

The caption of the case contains the names of all parties except the United States of America, which was not named in the Complaint but is the real party in interest under Count III. At the time of filing the Complaint, Todd Patterson was a minor suing by his parents. He subsequently came of age.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Third Circuit is reported at 893 F.2d 595 (1990), and is reprinted in the Appendix. (1a) The Third Circuit's order denying the petition for rehearing and suggestion for rehearing en banc is unreported. (130a) The decision of the United States District Court for the District of New Jersey is reported at 705 F. Supp. 1037 (1989), and is reprinted in the Appendix (48a). The opinion and order of the District Court denying plaintiff's motion for reconsideration is unreported. (126a) The opinion and order of the District Court denying plaintiff's motion to vacate the judgment or, in the alternative to supplement the record, is also unreported. (120a)

JURISDICTION

The judgment and opinion of the Court of Appeals for the Third Circuit, affirming the judgment of the District Court dismissing all counts of plaintiff's complaint, was entered on January 8, 1990. The order of the Court of Appeals denying the petition for rehearing and suggestion for rehearing en banc was entered on February 7, 1990.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant parts of the First Amendment to the United States Constitution; the Privacy Act, 5 U.S.C. § 552a(e); and Rule 56, Federal Rules of Civil Procedure, are included in the Appendix at 307a.

STATEMENT OF THE CASE

A. Factual Background

When plaintiff-petitioner was 11 years old, he embarked on an ambitious project to prepare a personal world encyclopedia. After exhausting local sources of information, the precocious Todd wrote to 169 countries requesting information about their peoples and governments. For his initial inquiries, Todd used envelopes bearing the return address of "Laboratory Disposable Products," a business operated by Todd's parents out of the family home in North Haledon, New Jersey. These letters of request were sent to the addresses of foreign governments and missions both within and outside the United States. (239a)[1]

Todd's interest in international

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[1] Since the case was dismissed on the defendants' motion for summary judgment, most of the facts supporting plaintiff's claims are set forth in the affidavits of Todd (239a) and his mother (246a).

affairs has not abated, and he continues his international correspondence in a quest for current information. Since his first mailings in 1983, Todd has received more than 50 pieces of mail in damaged condition, some entirely devoid of contents. In one instance, an envelope from the Soviet mission in New York City was received resealed containing a piece of mail from Sweden addressed to an unrelated individual in a nearby community. The Postal Service has been unable to provide Todd or his family with an explanation for the excessive amount of damaged mail he receives. (241a)

Through methods unknown to plaintiff, possibly as a result of unauthorized mail covers and illegal interference with both domestic and foreign mail, the defendant Federal Bureau of Investigation ("FBI") became aware of Todd's correspondence with

foreign government agencies and embassies. In 1983, FBI agent John E. Butenshoen appeared unannounced at the Patterson home. Agent Butenshoen was admitted to the house by Todd's mother, who was speaking to her husband on the telephone at that moment. Agent Butenshoen spoke to both Mr. and Mrs. Patterson about Todd's project. Mrs. Patterson then escorted the agent to Todd's room and permitted him to examine Todd's correspondence files.

On February 23, 1984, Agent Butenshoen prepared a file memo reporting on his visit to the Patterson home. The memo stated in part:

> Todd Patterson is a 12 year old boy who is in the midst of a school project wherein he is researching and writing an encyclopedia of the world. It is indicated that he has written to about 170 foreign countries for information. He advised that he figured he would write to all countries so he could see what type of information they could offer. This correspondence was enclosed in his father's business

envelopes.

* * *

In view of the above, Newark contemplates no further investigation in this matter. (D2)[2]

A notation on the memo stated that the title of the file was being changed from "Laboratory Disposable Products" to "Todd Patterson."

In 1987, Todd became aware of the existence of the Freedom of Information Act ("FOIA") and made a request to the FBI for any records it was maintaining concerning him or his activities. On August 12, 1987, Todd was informed by letter that the FBI was maintaining such records but that none of those records could be released to him for reasons of national security. (58-9a)

Todd has long contemplated a career in

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[2] The documents released to Todd are separately lodged with the Court as Supplemental Appendix of Documents. The initially released documents are designated D1-D13, in accordance with the FBI's original designations.

the foreign service (ergo his early interest in information about foreign countries), and he and his family became understandably alarmed to learn that the FBI did indeed consider him of interest for reasons of "national security." (244a, 249-50a)

As a result of Todd's appeals under the FOIA and this litigation, which was instituted in May 1988, some details of the records maintained on Todd have been disclosed. Main files and cross-reference files are maintained on Todd at FBI Headquarters in Washington, and at the Newark and New York field offices. Defendants acknowledge the existence of one main file and two cross-reference files in Washington Headquarters; one main file and two cross-reference files in Newark; and one main file and eight cross-reference files in the New York field

office. The Headquarters and Newark files initially identified by defendants included 13 documents (D1-D13), consisting of 30 pages, some of which were duplicates. The pages released to Todd were heavily redacted and referred to at least six other pages withheld in their entirety. Subsequently, following entry of summary judgment by the District Court, the Newark office identified four additional pages, which were partially released along with records on Todd which were being separately maintained by the New York FBI office. Seven redacted pages from the New York files were turned over to Todd.[3]

Although the Butenshoen memo of 1984 stated that Todd's case should be closed, new reports were added to Todd's

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[3] The documents in the final FOIA release to Todd following the entry of summary judgment by the District Court are contained in the Supplemental Appendix lodged with the Court, at DD1-DD17.

Newark file in 1987 and 1988. On June 23, 1987, the Newark FBI office sent an airtel to the Acting Director of the FBI concerning "Subject: Todd Patterson," which reviews the prior history of the office's investigation, but with the substance of the new communication excised. (D13) A March 18, 1988, memorandum addressed to the Newark Special Agent in Charge from a concealed source consists of a number of redacted paragraphs with only one unredacted sentence: "This entire communication is classified as secret." An attached page is withheld in its entirety. (DD3) The New York file includes, inter alia, newspaper reports and a picture of Todd clipped from the New York Daily News and stamped "SECRET." (DD14, DD15)

Todd, now 18, is completing his freshman year at the State University of

New York at Plattsburgh, where he is enrolled in the Canadian Studies Program. During the third year of the program, students have an opportunity to work with the Canadian Parliament, at which time he will require a security clearance. (250a)

B. Procedural History

In May 1988, Todd instituted a civil suit, through his father, against defendants FBI; John Doe, an unknown employee of the United States Government; and John Doe Agency, an unknown agency of the United States Government. The suit sought injunctive relief and/or damages under three distinct causes of action: (1) failure to comply with the Freedom of Information Act, 5 U.S.C. § 552; (2) violations of the Privacy Act, 5 U.S.C. § 552a(e)(7), by the FBI for its maintenance of records describing Todd's exercise of rights guaranteed by the First Amendment without legal justification; and (3)

violations by John Doe and John Doe Agency of Todd's constitutional and statutory rights to freedom of correspondence through the U. S. mails. (289a)

Following submission by the government of a Vaughn index,[4] explaining the FBI's claims of exemption from document disclosures under the FOIA cause of action, plaintiff served upon defendants 30 Interrogatories, mainly directed towards counts 2 and 3 of the complaint. Defendants objected to most of plaintiff's Interrogatories on grounds of privilege, and plaintiff moved to compel more responsive answers. (252a) [5] On the same

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[4] Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

[5] Among the information defendants refused to supply was the identity of the other federal agencies which provided information concerning Todd's correspondence (Interrogatories No. 25, 26 and 28) and the prefixes assigned to Todd's files (Int. No. 1(b)). (255a) The FBI classifies its records in 264 categories, from the benign to the dangerous, each with its own prefix. 52

date, plaintiff also moved for class certification. Neither of these motions was ruled upon by the District Court.

The government moved for summary judgment on counts 1 and 2 of the complaint and moved to dismiss count 3 for lack of jurisdiction over John Doe and John Doe Agency. Plaintiff submitted a Statement of Material Facts and the affidavits of Todd Patterson and his mother, Betsy Sue Roughgarden Patterson, in opposition to the motion. (225a) A hearing on all pending motions was scheduled for December 15, 1988. Judge Alfred Wolin heard argument first on the government's motion to dismiss, and postponed hearing on plaintiff's discovery

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Fed. Reg. 47230-36 (Dec. 11, 1987). As counsel explained to the District Court, it was crucial that the family know whether the FBI had classified Todd as a security risk or merely as a "precocious teenager." (199a)

and class action motions pending disposition of the government's motion. At the conclusion of the oral argument, Judge Wolin announced that he was

> not satisfied that the F.B.I. has demonstrated that the files maintained on a claim of exercise of first amendment rights were pertinent to an authorized law enforcement activity as required by the Privacy Act. In its current affidavits, the F.B.I. merely cites to the Espionage Act and to the Foreign Agents Registration Act. That is not sufficient to maintain records on citizens' exercise of first amendment rights except when related to specific law enforcement objectives. (221-22a)

He, therefore, ordered the FBI to submit an additional affidavit in camera "detailing how the records maintained on Mr. Patterson were pertinent and related to a specific law enforcement activity of the F.B.I." (222a) Subsequent to the hearing, Judge Wolin further instructed the defendant, by letter, to submit for his in camera inspection some of the

documents from Todd's file which had been withheld from plaintiff in whole or part. (115-16a)[6]

After ex parte review of the requested documents and an affidavit from Assistant FBI Director James H. Greer, Judge Wolin granted the government's motion for summary judgment in toto on February 7, 1989. (48a) Plaintiff filed a timely motion for reconsideration based on the court's reliance on ex parte submissions not shared with plaintiff or admissible in evidence in support of its dismissal of counts 2 and 3. (173a) Plaintiff contended that such reliance on secret evidence violated both F.R.C.P. 56, and Due Process. The motion was denied with an opinion by Judge Wolin on March 30, 1989. (126a) Plaintiff filed a timely notice of

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[6] Defendants also submitted a formal Claim of Privilege from Attorney General Dick Thornburgh in regard to the withheld documents under the FOIA.

appeal to the United States Court of Appeals for the Third Circuit.

After the summary judgment motion had been decided and judgment entered for defendants, plaintiff was informed by the FBI that several additional records concerning Todd had been located in the Newark regional office and that the New York regional office was maintaining a main file on Todd and eight cross-reference files. In April, plaintiff made a new motion to vacate the judgment or, in the alternative, to supplement the record, pursuant to F.R.C.P. 60(b), based on newly discovered evidence, to wit the additional documents from the FBI offices in Newark and New York. (167a) That motion was denied by opinion and order dated August 16, 1989. (129a) Plaintiff filed another timely notice of appeal to the Third Circuit from the denial of the Rule 60(b) motion, and the Court of Appeals issued an

order consolidating the two appeals.

The appeal was argued in the Third Circuit on November 9, 1989. An opinion affirming the District Court's decision was issued on January 8, 1990. (1a) Petitioner filed a motion for rehearing and rehearing en banc on January 19; it was denied without opinion on February 7, 1990. (130a)

REASONS FOR GRANTING THE WRIT

I. THIS CASE RAISES UNRESOLVED ISSUES CONCERNING THE INTERPRETATION OF THE 16-YEAR-OLD PRIVACY ACT THAT AFFECT THE POLITICAL PRIVACY RIGHTS OF MILLIONS OF AMERICANS

The Privacy Act of 1974, adopted in the post-Watergate era, implements the spirit of the First Amendment and judicial decisions restricting governmental monitoring of protected political expression and action. Section (e)(7) of the act, which is at the heart of this

case, severely restricts both the collection and the maintenance by federal agencies of information describing an individual's First Amendment activity. Its adoption followed several years of Congressional investigations of the discredited practice of building data bases describing the political activities of government critics and others suspected of having unorthodox political views, a practice which was widespread in the J. Edgar Hoover era among other federal agencies as well as the Federal Bureau of Investigation.[7] The act was clearly

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[7] The problem is voluminously described in the 1971 hearings of the Ervin Committee, Federal Data Banks, Computers and the Bill of Rights: Hearings Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary, 92d Cong., 1st Sess. (1971) (2 parts); and the 1976 report of the Church Committee, Intelligence Activities and the Rights of Americans, Book 2 of the Final Report of the United States Senate Select Committee to Study Government Operations With Respect to Intelligence Activities, S. Rep. 755, 94th Cong., 2d Sess. (1976) (3 vols.).

"designed to preclude the reoccurrence of [such] past governmental abuses." Joyce, The Privacy Act: A Sword and a Shield But Sometimes Neither, 99 Mil. L. Rev. 113, 131 (1983).

One of the legislators most closely associated with the enactment of the Privacy Act was Senator Sam Ervin of North Carolina, whose Senate Constitutional Rights Subcommittee hearings had focused on the domestic intelligence program of the United States Army. Senator Ervin's findings formed part of the backdrop for the Privacy Act:

> Despite First Amendment rights of Americans, and despite the constitutional division of power between the federal and state governments, despite laws and decisions defining the legal role and duties of the Army, the Army was given the right to create an informational system of data banks and computer programs which threatened to erode these restrictions on government power.[8]

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[8] Legislative History of the Privacy Act of 1974, S.3418 (Pub. L. 93-579): Source Book on Privacy, Joint

But it was not only the Army's political surveillance practices which were to be curtailed by § (e)(7). "Data collection abuses that accompanied the surveillance of citizens by military, intelligence and law enforcement agencies and the Watergate scandal" were all part of its legislative history. R. Ehlke, The Privacy Act of 1974, in Privacy Law and Practice (M. Bender ed. 1987) ¶ 2.01, at 2-3.[9] The FBI had been specifically chastised for its creation of a huge database describing the First Amendment activities of millions

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Committee Print of Senate and House Committees on Government Operations, 94th Cong., 2d Sess. 167 (1976) [hereinafter cited as Source Book].

[9] Richard Ehlke, attorney with the Congressional Research Service, Library of Congress, has been the main chronicler of the Privacy Act. See also Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829 (1985). His chapter in the Bender treatise catalogs the "numerous [congressional] hearings held on aspects of privacy" during the period leading up to its adoption. Ehlke at 2-3 n.2.

of Americans. See Intelligence Activities and the Rights of Americans, S. Rep. 755, 94th Cong., 2d Sess. (1976)(3 vols.) Book II at 47, 316-41. See generally Donner, The Age of Surveillance: The Aims and Methods of America's Political Intelligence System (1980).

Although § (e)(7) represents only one part of the comprehensive legislation designed to safeguard many aspects of citizen privacy, as Ehlke has observed:

> The Act's prohibition against agency maintenance of records relating to an individual's first amendment activities embodies one of the concepts that motivated enactment of privacy legislation in the first place.

Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829, 844 (1985). Despite the clear Congressional intent to end the discredited practice of creating and maintaining permanent files on individuals who had done nothing beyond

exercising rights protected by the First Amendment, there is mounting evidence that the FBI continues to do so, suggesting that the experience of Todd Patterson is just the tip of an iceberg. See, for example, the 1989 report of the United States Senate Select Committee on Intelligence, The FBI and CISPES, S. Rep. 46, 101st Cong., 1st Sess. at 128, reporting that "[t]he FBI files on the CISPES investigation contain information about the lawful political activities of Americans that should not have been collected by the U.S. government."[10]

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[10] The Committee in Solidarity with the People of El Salvador (CISPES) was a nationwide organization actively opposed to American policy in Central America. According to the Senate report, FBI Director Sessions testified that the CISPES investigation "caused information on rank-and-file members who had nothing to do with international terrorism to be included in the FBI case files." The FBI and CISPES at 99, citing Senate Select Committee on Intelligence Inquiry Into the FBI Investigation of the Committee in Solidarity with the People of El Salvador (CISPES), S. Hrg. 1051 (hearings of Sept. 14, 1988) at 122. It found that the FBI

Despite the continuing public importance of the issue, 16 years after the adoption of the Privacy Act, this Court has yet to give plenary consideration to a single case arising under it. One consequence of this failure may well be the conflict and disagreement among lower federal courts on the proper interpretation of § (e)(7).

A. The Third Circuit's Interpretation of § (e)(7) Undermines Important Congressional Policy Designed to Provide Individuals Maximum Protection for the Exercise of First Amendment Rights Free From Fear of Monitoring by Government Agencies

Without any factual explanation, the court below, like the District Court, held that the FBI did not violate § (e)(7) of

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had compiled 330 volumes of investigative files which were associated with the CISPES investigation, and that FBI inspectors identified a total of 24,285 unique names, consisting of 13,198 persons and 11,087 organizations in the main CISPES case files. Eighteen per cent of the indivdual names were indexed for future reference. Id.

the Privacy Act by maintaining more than half a dozen permanent, retrievable files describing Todd Patterson's innocent and protected correspondence seeking information from foreign governments. The court's decision was based on its determination that maintenance of those files was "relevant to an authorized law enforcement activity of the agency." (37a) That standard is not only at variance with those adopted by other Circuits, see pp. 36-40, infra, but seriously erodes, and threatens to nullify, the Congressional policy underlying § (e)(7).[11]

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[11] While the defendants have offered voluntarily to destroy Todd's files in exchange for abandonment of this litigation, they have not promised to exempt his continuing correspondence from monitoring; nor have they offered to prohibit the various FBI offices from establishing new files on Todd every time it is discovered that he has engaged in new correspondence with a "suspect" foreign government. It should also be noted that if this case is remanded to the District Court, a motion for class action certification is still pending.

Even prior to the adoption of the Privacy Act, this Court had held that American citizens had a First Amendment right to receive mail from Communist governments without having their names included on a permanent roster of recipients. Lamont v. Postmaster General, 381 U.S. 301 (1965).[12] Other cases held that the chilling effect inherent in governmental inquiry into the individual exercise of rights guaranteed by the First Amendment required constitutional protection. See, e.g., DeGregory v. New Hampshire Attorney General, 383 U.S. 825 (1966); Gibson v. Florida Legislative

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[12] The chilling effect on First Amendment rights caused by the government's action here is analagous to that condemned by the Court in Lamont, where it commented that "any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" Id. at 307. Similarly will addressees be chilled to know that correspondence with Communist governments results in permanent dossiers in various FBI offices.

Investigation Committee, 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). See generally, Comment, The Justiciability and Constitutionality of Police Intelligence Gathering, 30 U.C.L.A. L. Rev. 976 (1983); Askin, Police Dossiers and Emerging Principles of Constitutional Adjudication, 22 Stan. L. Rev. 196 (1970). The adoption of § (e)(7) of the Privacy Act was intended to expand and implement the First Amendment protections provided by the above cases, not to dilute them. This was made explicit by Congressman Ichord of Missouri, the sponsor of the law-enforcement exception to § (e)(7):

> Let the legislative history be explicit. None of the changes are intended to abridge the exercise of First Amendment rights.

Source Book at 902-03. Cf. MacPherson v. I.R.S., 803 F.2d 479, 484 (9th Cir. 1986)("By enacting this exception, . . .

Congress did not intend to dilute the guarantees of the First Amendment by authorizing the maintenance of files on 'persons who are merely exercising their constitutional rights.'" (quoting Clarkson v. IRS, 678 F.2d 1368, 1374 (11th Cir. 1982)).

In their crabbed interpretation of § (e)(7), the courts below totally ignored its context within the Privacy Act. A central purpose of the Act as a whole was to reduce the amount and type of personal information kept by the federal government. To that end, § (e)(1) mandates that agencies maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. § 552a(e)(1) (emphasis added). Section

(e)(7) then adds the further restriction that when records deal with First Amendment activities they must also be "pertinent to and within the scope of an authorized law enforcement activity."

The Guidelines issued by the Office of Management and Budget ("OMB") pursuant to the Act, 5 U.S.C. § 552a(v), emphasize the relationship between the two sections:

> Whereas subsection (e)(1) generally enjoins agencies from collecting information not "relevant and necessary to accomplish a purpose of the agency," [subsection (e)(7)] establishes an even more rigorous standard governing the maintenance of records regarding the exercise of First Amendment rights.

Source Book at 1073 (emphasis added). Ironically, the Third Circuit applied a lesser standard for the maintenance of First Amendment information on individuals than that required for other personal records, by requiring they only be relevant, not relevant and necessary, to

agency activity. Such a view raises serious issues concerning the nation's constitutional and statutory commitment to informational privacy embodied in both the First Amendment and the Privacy Act.

B. The Decision Below Conflicts With the Interpretations of § (e)(7) Adopted by Other Circuits and the Intent of Congress

1. The Third Circuit erroneously decided that authorization to collect First Amendment information constituted justification for its permanent maintenance in individualized retrievable files

The Third Circuit opinion endorsed the District Court's conclusion that the authority to collect First Amendment information justified permanent maintenance of the information collected. (37-8a) The District Court had based that determination on the erroneous view that "All cases considering Section (e)(7) have concluded that even after the pertinent law enforcement activity has been

completed, the agency can continue to maintain the related records." (94a) In fact, two Circuits have held otherwise, MacPherson, 803 F.2d 479 (9th Cir. 1986), and Albright v. United States, 631 F.2d 915 (D.C. Cir. 1980), and their conclusions would appear to be more faithful to the statutory language and legislative history of § (e)(7), which defines "maintain" as including four separate and distinct activities: "to maintain, collect, use or disseminate." 5 U.S.C. § 552a(a)(3).

In MacPherson, the Ninth Circuit engaged in an independent analysis of the IRS's need to maintain information lawfully collected during an authorized investigation of MacPherson's participation in "tax protester" conventions. 803 F.2d at 483. The court cited with approval the language of the

District Court in Jabara v. Kelley, 476 F. Supp. 561, 581 (E.D. Mich. 1979):

> Merely because [an agency] may act within its authority by monitoring the public or private speeches of a person in the course of a legitimate security investigation does not give it the right to maintain records relating to the contents of the speeches where the investigation does not focus on a past or anticipated specific criminal act. (Citations omitted.)[13]

MacPherson, 803 F.2d at 483 (emphasis added). However, since the information was not being maintained in files indexed to MacPherson, the court held that continued maintenance of the information was justified for the purpose of keeping an accurate record of the tax protester proceedings. Id. at 484-85.

Similarly, the D.C. Circuit, in addressing the authority of an agency to

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[13] The District Court's decision in Jabara was subsequently reversed by the Sixth Circuit, sub. nom. Jabara v. Webster, 691 F.2d 272 (1982), cert. denied, 464 U.S. 863 (1983).

collect information, held that each of the four components of "maintain" had to be separately considered, stating that "the Act clearly prohibits even the mere collection of such a record, independent of the agency's maintenance, use or dissemination of it thereafter." Albright, 631 F.2d at 918.

The Third Circuit's holding that authorized collection justified permanent maintenance of individually indexed records on Todd's exercise of First Amendment rights is also inconsistent with the legislative history of § (e)(7). The Senate Report clearly states that an agency's authority to investigate does not necessarily empower that agency to maintain the information gathered:

> [It is] the intent of the Committee . . . that in terms of privacy there should be a general policy to extend the zones of personal and group freedom from compulsory data collection so that matters that ought not to be

> considered in making decisions about individuals do not become part of a formal record at all.
>
> . . . [U]nder our Constitution, there are, or may be, some human activities of which Government should not take note for any purpose at all because of the detrimental effect on freedom, and . . . this is true whether or not the information is intended to be used to make decisons about specific individuals. . .
>
> The section is designed to implement the following policy judgments in the report:
>
> > A further consideration where need for collecting data is at issue is whether records should be retained beyond their period of likely use for the purposes for which they were originally collected. . . To the extent that evaluators today have such records to consult, especially for decisions that are not visible to the individual, the presence of such information represents a dead (and improper) hand from the past.

S. Rep. 1183, 93rd Cong. 2d Sess., reprinted in U.S. Code Cong. & Admin. News 6971 (1974) (emphasis added).

Rather than await the misuse of this information before complaining, as the FBI

in essence urges Todd to do, the Privacy Act was intended to prevent the maintenance of such information so that misuse does not occur.

> This section's restraint is aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that the Government or the particular agency might possibly have to deal with them in the future.

Id. at 6960-71 (emphasis added).

The Third Circuit's approval of the maintenance of permanent files on Todd is even at war with its own earlier opinion in Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975), which, inexplicably, the court did not even cite in the Patterson opinion. In Paton, a case which predated the enactment of the Privacy Act, the Third Circuit recognized a plaintiff's right to expungement of her FBI file under very similar circumstances. Responding to a claim that the FBI was maintaining

information concerning the First Amendment activities of a teenager after intercepting her letter to a domestic political organization as a result of a mail cover, the court held the plaintiff was entitled to seek judicial expungement of her record directly under the First Amendment. The court held that the existence of such a file threatened palpable harm to plaintiff. 524 F.2d at 868. On remand, the District Court provided such relief. Paton v. LaPrade, 469 F. Supp. 773 (D.N.J. 1978) and 471 F. Supp. 166 (D.N.J. 1979). Cf. Smith v. Nixon, 807 F.2d 197 (D.C. Cir. 1986) (opinion by Scalia, J).

Contrary to Paton, which recognized a right of direct action under the First Amendment to protect political privacy in the absence of Congressional action, the Third Circuit's new decision perversely

transforms the Privacy Act into a license for the FBI to invade such protected rights. However, rather than being intended to expand the authority of government agencies to maintain individualized First Amendment information, the Privacy Act was clearly intended to expand protection to individuals such as Lori Paton and Todd Patterson and to implement "Congress'. . . concern regarding the implication of computerized data banks for personal privacy..." United States Department of Justice v. Reporters Committee for Freedom of the Press, 108 S.Ct. 1468, 1478 (1989). It was in the Reporters Committee opinion that the Court emphasized the difference between mere governmental collection of personal information and its transformation into easily accessible personal dossiers. As the opinion by Justice Stevens explained, so long as

uncollated and irretrievable information sits in a government repository it remains in "practical obscurity." Id. at 1485. However, that same information gathered into a computerized, name-indexed system of records becomes a decided threat to personal privacy and implicates important policies embodied in the Privacy Act.

2. The "relevance" standard adopted by the Third Circuit conflicts with decisions of other Circuits

The statutory definitions contained in the Privacy Act do not include "pertinent to," "within the scope of" or "law enforcement activity," nor does the language itself provide substantive guidance. Further, the OMB Guidelines provide only general guidance. Thus, it is not surprising that the Circuits have developed conflicting interpretations of the law enforcement exception in § (e)(7).

In Patterson, the Third Circuit held that the exception applies where records on First Amendment rights are "relevant to an authorized law enforcement activity." (37a) The opinion noted the variety of standards articulated by the Circuits but made no effort to reconcile them or justify its own interpretation. (34-36a) Nor does the court provide any guidance as to the content of the term "relevance."

Prior to the decision of the Third Circuit in the instant action, four Circuits had spoken on the issue. Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983); MacPherson v. I.R.S., 803 F.2d 479 (9th Cir. 1986); Clarkson v. I.R.S., 678 F.2d 1368 (11th Cir. 1982), vacated and remanded, 691 F.2d 272 (11th Cir. 1982), cert. denied, 464 U.S. 863 (1984); Nagel v. United States Department of Health, Education and Welfare, 725 F.2d 1438 (D.C.

Cir. 1984) (adopting the Jabara standard).

In Jabara, the Sixth Circuit rejected the District Court's limitation of the law enforcement exception to records which "related to specific past, present or future criminal acts." 691 F.2d at 279-80. The Circuit determined that the District Court's interpretation was "too narrow" and held that the law enforcement exception permits maintenance of records describing an individual's exercise of First Amendment rights if "the investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." Id. at 280 (emphasis added).

However, prior to the Sixth Circuit's ruling, the Eleventh Circuit, in Clarkson, had adopted the Jabara trial court's narrower interpretation, and held that § (e)(7) is violated when the information

collected is "unconnected to any investigation of the past, present or anticipated violations of the statutes which it is authorized to enforce . . ." Clarkson, 678 F.2d at 1375.

In MacPherson, the Ninth Circuit struck out in a different direction altogether, adopting a case-by-case balancing test. 803 F.2d at 483-85. It rejected the "common feature" of both the Sixth and Eleventh Circuit standards, "their apparently definitive statement of a 'rule' with broad application to § (e)(7) cases." Id. at 483. See generally Ehlke, The Privacy Act After a Decade, 18 J. Marshall L. Rev. 829, 844 (1985) (criticizing a broad interpretation of the law enforcement exception); Joyce, The Privacy Act: A Sword and a Shield But Sometimes Neither, 99 Mil. L. Rev. 113, 132 (1983) (criticizing the Sixth Circuit for failure to adequately balance the

competing interests).

The Third Circuit expressly rejected an "ad-hoc" or case-by-case balancing test as set forth by the Ninth Circuit in MacPherson. (36a) Nor does its decision comport with the Eleventh Circuit's standard which required a direct connection to law violations -- past, present or future.

These are important issues which go to the heart of the Privacy Act's protection for First Amendment rights. After sixteen years, it is time that they be clarified.

II. THIS COURT SHOULD DECIDE UNDER WHAT CIRCUMSTANCES A FEDERAL COURT MAY RESOLVE DISPUTED ISSUES OF MATERIAL FACT ON THE BASIS OF EX PARTE, IN CAMERA EVIDENCE, AN ISSUE ON WHICH THERE IS DISAGREEMENT AMONG THE CIRCUITS

The District Court found on the public record that the government had failed to demonstrate the absence of a genuine issue

of material fact regarding the FBI's authority to maintain records on Todd's First Amendment activities. At the conclusion of the summary judgment hearing, the trial judge announced that he was "not satisfied" that the files maintained by the FBI on Todd "were pertinent to an authorized law enforcement activity as required by the Privacy Act" (221-22a), and directed the FBI to submit an ex parte affidavit justifying its claim of pertinence. (222a) Following his in camera examination of this additional "proof," the trial judge resolved his doubts and issued his opinion granting summary judgment to defendants, stating:

> Because the FBI had not made an adequate showing of the relevance of records maintained on plaintiff's exercise of First Amendment rights to an authorized law enforcement activity, the Court ordered the FBI to submit an in camera affidavit which would further attempt to demonstrate the required relevance. The FBI subsequently submitted the Greer

> affidavit to serve this purpose. Upon review of the Greer affidavit, the Court now finds that records maintained by the FBI on plaintiff's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the FBI and that the continued maintenance of such records does not violate any provision of the Privacy Act. (97a) [emphasis added][14]

The resolution of disputed issues of material fact on the basis of secret evidence not shared with an opposing party

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[14] The District Court similarly resolved material issues of fact involved in plaintiff's third cause of action against John Doe Agency for illegal mail tampering on the basis of ex parte submissions, stating:

> After reviewing the record as a whole, including in camera inspection of the withheld documents and the Greer affidavit, the court finds, as a matter of fact, that the FBI and any FBI or other government employees involved in activities concerning plaintiff acted in accord with all applicable statutory and regulatory guidelines. (105-06a) [emphasis added]

The Court of Appeals affirmed the dismissal of the third count on an alternative theory of lack of in personam jurisdiction. See Point 3, infra.

raises fundamental issues of Due Process of Law and the adversary system, as well as issues concerning the operation of Rule 56 of the Federal Rules of Civil Procedure, never decided by this Court.

A. The Use of Secret Evidence to Resolve Genuine Issues of Material Fact Is Inconsistent With Fundamental Principles of Due Process as Well as F.R.C.P. 56

Prior to the 1984 decision of the Court of Appeals for the District of Columbia in Molerio v. United States, 749 F.2d 815, there is no clear authority in American law for a federal court to resolve genuine issues of fact going to the merits of a dispute on the basis of ex parte evidence.[15] Absence of prior

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[15] Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), leaves open the possibility of substantive consideration of an in camera affidavit on remand, but there is no clear holding on the issue. Disputes arising under the Freedom of Information Act may be disposed of on the basis of in camera examination of documents, but those cases are sui generis. The only substantive issue

precedent is not surprising, since it is axiomatic that Due Process of Law requires an adversary proceeding.[16] As observed by

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involved in such cases is the plaintiff's right of access to documents, and that right is itself limited by built- in exemptions for privileged documents. To require a full adversary proceeding in such cases would destroy a purpose of the legislation -- to limit public access to those documents not privileged -- in the very process of adjudication. Cf. Weinberger v. Catholic Action of Hawaii, 454 U.S. 139, 145-46 (1981).

[16] It is, of course, not unusual for a court to determine, as a result of in camera review, that certain evidence is privileged and not subject to discovery. See Reynolds v. United States, 345 U.S. 1 (1953); Halkin v. Helms, 598 F.2d 1 (D.C. Cir. 1978). See also United States v. Zolin, 109 S. Ct. 2619 (1989). However, the consequence in such cases is merely to remove the evidence from consideration and not to use it as the basis for resolving factual disputes. Thus, the fact that the government properly invoked the state secrets privilege in this case does not mean that the privileged evidence can be used in support of the government's summary judgment motion.

In a criminal proceeding, the government does not even have the option of suppressing "government secrets" which have relevance to the defense. Under the Classified Information Procedures Act ("CIPA"), Pub. L. 96-456, reprinted in 18 U.S.C. App. at 706 (1980), the government is put to a choice of releasing the

the District of Columbia Court of Appeals subsequent to Molerio:

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of ex parte, in camera submissions.

Abourezk v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986), aff'd 484 U.S. 1 (1987).[17] See also Fuentes v. Shevin, 407 U.S. 67, 81 (1972), reh'g denied, 409 U.S. 902 (1972)("[N]o better instrument has been devised for arriving at truth than to

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privileged material or foregoing prosecution of the defendant.

[17] Abourezk distinguished Molerio as a case involving "most extraordinary circumstances," Id. at 1061, without explaining what was extraordinary about it.

give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it." (quoting Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 170-72 (1951) (Frankfurter, J., concurring)); Carroll v. Princess Anne, 393 U.S. 175, 183 (1968) ("The value of a judicial proceeding . . . is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate."); Endicott Johnson Corp. v. Encyclopedia Press Inc., 266 U.S. 285, 288 (1924)("The words 'due process of law,' when applied to judicial proceedings, . . . require a proceeding which, . . . whenever it is necessary for the protection of the parties, gives them an opportunity to be heard respecting the justice of the judgment sought.").

The court below acknowledged the "anomolous situation" in which it placed the plaintiff by forcing him "to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense," (20a) but felt that examination of the secret evidence by the judge afforded the plaintiff sufficient protection of his Due Process rights. (21a) However, this Court has frequently warned that ex parte judicial review is not an adequate alternative to adversarial examination. See Alderman v. United States, 394 U.S. 165 (1969), reh'g denied, 394 U.S. 939 (1969); and Dennis v. United States 384 U.S. 855, 875 (1966) ("In our adversary system, it is enough for judges to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.").

The requirement of an adversary contest over the proofs is enforced at the point of summary judgment by Rule 56(e), which requires that supporting "affidavits shall . . . set forth facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." The claims that documents are both "privileged" and "admissible in evidence" are mutually exclusive.

B. There is Conflict Among the Circuits as to the Propriety of a Court's Resolution of Genuine Issues of Fact on the Basis of Ex Parte, In Camera Submissions

By following Molerio,[18] the court

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[18] In upholding the use of ex parte materials in support of a motion for summary judgment, the court below also cited three other cases which it claimed "allowed the use of in camera affidavits in national security cases." (20-21a) However, the other cases are quite distinguishable. Fitzgerald v. Penthouse Int'l Ltd., 776 F.2d 1236 (4th Cir. 1985), is a typical privilege case in which the suppression of privileged information leaves the plaintiff unable to establish a

below ignored the contrary authority from the First Circuit, which on several occasions has reversed lower court decisions because the trial judge had relied on privileged, ex parte materials in granting summary judgment. In Association for Reduction of Violence v. Hall, 734 F.2d 63 (1st Cir. 1984), the court held that Federal Rule of Civil Procedure 56 restricted the materials available to the court on a summary judgment motion to "those that would be admissible in evidence or otherwise available at trial." Id. at 67 (citing 6

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prima facie case. See note 14, supra. Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982), cert. denied 464 U.S. 863 (1983), is a decision on an issue of law concerning the interpretation of the Privacy Act. See Point I, supra. While there is a reference to "in camera affidavits" submitted to the District Court, Id. at 279, there is no clear holding as to the propriety of their use in support of a motion for summary judgment. See note 15, supra. Hayden v. N.S.A., 608 F.2d 1381 (D.C. Cir. 1979), is an F.O.I.A. case. See note 13, supra.

Moore's Federal Practice, § 56.11 [1.-8] at 56-205 to 207 (1983)). Hall was a civil rights action by prison inmates who claimed they had been the victims of retaliatory transfers for the exercise of rights protected by the First Amendment. The trial judge acknowledged that in granting summary judgment he had reviewed certain documents which he had earlier ruled privileged and exempt from discovery by plaintiffs following an in camera examination. In reversing, the Circuit emphasized that in camera inspections should be "conducted solely to determine discoverability and not 'for the purpose of making any ex parte determination on the merits.'" Id. at 67. Hall relied on a prior Circuit opinion in Bane v. Spencer, 393 F.2d 108, 109 (1st Cir. 1968), cert. denied, 400 U.S. 866 (1970), which contains language particularly appropriate

to the instant case:

> [T]he defendant should not be able to use the [impounded] records as a sword to seek summary judgment and at the same time blind plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment.

A district court in Massachusetts subsequently applied the principles enunciated in Hall and Bane to a case involving a claim of national security privilege. Allende v. Shultz, 605 F. Supp. 1220 (D. Mass. 1985), aff'd 845 F.2d 1111 (1st Cir. 1988). See also Kinoy v. Mitchell, 67 F.R.D. 1, 15 (S.D.N.Y. 1975)("Our system of justice does not encompass ex parte determinations on the merits of cases in civil litigation. [I]f the documents are privileged [then] the litigation must continue as best it can without them ....")

While the District of Columbia Circuit

in both Abourezk and In Re United States, 872 F.2d 472 (1989), cert. dis. 110 S. Ct. 398 (1989), acknowledged a possible exception to the principle of an adversary contest over facts when national security secrets are involved, neither case offered a standard for determining when such an exception would apply -- other than to suggest that such a "draconian" procedure, In Re United States, 872 F.2d at 477, should be limited to cases involving "the most extraordinary circumstances." Abourezk, 785 F.2d at 1061.

The Fourth Circuit has had its own internal conflict over the propriety of dismissing a suit between private parties over a military contract because the government objected that the litigation would disclose privileged, national security information. Farnsworth Cannon Inc. v. Grimes, 635 F.2d 268 (1980). The majority of the court en banc reversed a

split panel opinion which held that the plaintiff should be given an opportunity to demonstrate a prima facie case without reference to the privileged materials. The majority held that "any attempt on the part of the plaintiff to establish a prima facie case would so threaten disclosure of state secrets that the overriding interest of the United States ... precludes any further attempt to pursue this litigation." Id. at 281. In dissent, Judge Murnaghan objected: "The opportunities for unexplicated imposition of arbitrary fiat under the rule the majority adopts are potentially frightening." Id. at 283. Judge Phillips wrote a separate dissent for three members of the court.

This case offers an appropriate vehicle for providing guidance to the lower federal courts on this exceedingly important and difficult question,

including whether there might be less drastic alternatives to dismissal which might be invoked even when significant government secrets might be at stake. Compare the test for the issuance of prior restraints against the revelation of government secrets, New York Times Co. v. United States, 403 U.S. 713 (1971), which, like secret judicial decisions, involves the subordination of fundamental constitutional rights in order to protect government secrecy.

III. DISMISSAL OF A CASE FOR LACK OF IN PERSONAM JURISDICTION BECAUSE THE UNITED STATES, THE REAL PARTY IN INTEREST, REFUSES TO DISCLOSE THE IDENTITY OF ITS AGENTS RESPONSIBLE FOR VIOLATING PLAINTIFF'S CONSTITUTIONAL RIGHTS IS INCONSISTENT WITH DOCTRINES OF THIS COURT DATING BACK TO MARBURY V. MADISON

The court below held that the refusal of the real defendant in interest, the United States of America, to reveal the identity of its agent wrongdoers stripped

the District Court of in personam jurisdiction over named defendants John Doe and John Doe Agency.[19] Such a bizarre holding raises important and novel issues of federal law never directly decided by this Court, and is in apparent conflict with well settled principles of constitutional jurisprudence.

Plaintiff's uncontradicted allegations established that (1) his first-class mail directed to foreign-government offices had been intercepted by some agent or agency of the United States government, which had so informed the FBI, and (2) over an extended period of time, his incoming mail from the domestic and overseas offices of foreign governments had been regularly

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[19] After determining that plaintiff would not be entitled to any further discovery as to the identity of the agents and/or agency that interfered with his mail, the Court of Appeals held: "Since the suit could not be maintained against a fictitious party, the district court lacked in personam jurisdiction." (45a)

opened and tampered with, to the extent that on one occasion he received an envelope from the Soviet mission in New York City containing inside an envelope from Sweden addressed to a total stranger in Wayne, New Jersey. (240-41a) In the absence of evidence of legal justification by the agency involved, Todd's sworn allegations would appear to establish a violation of his right to freedom of correspondence under the First Amendment. Ex Parte Jackson, 96 U.S. 727 (1878). Cf. Ramsey v. United States, 431 U.S. 606, 623-24 (1977); United States v. Leeuwen, 397 U.S. 249, 251 (1970).

Since the court below offered no authority other than its own ipse dixit to support its jurisdictional holding, it is not at all clear on what legal principles it was based. Certainly, there is no generic prohibition against a federal court's asserting in personam jurisdiction

over real but unknown defendants. See Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971). Nor is petitioner aware of any authority that questions the power of a federal district court to assert personal jurisdiction over an agency of the United States government under Due Process standards required by either the Fifth or Fourteenth Amendments. Indeed, it is generally held that 28 U.S.C. § 1391(e), providing for venue in suits against federal officials in the district in which the plaintiff resides, also provides for in personam jurisdiction over the defendant in the same district. See Stafford v. Briggs, 444 U.S. 527, 553-54 (1980)(Stewart, J., dissenting)("The cases before us involve suits against residents of the United States in the courts of the United States. No due process problem

exists.")[20]

The court's only explanation for its decision was the bald assertion that "suit could not be maintained against a fictitious party," a statement which, if taken literally, would be flatly contradicted by Bivens v. Six Unknown Agents, supra, and, therefore, can only have been intended to mean that a suit cannot be maintained against a fictitious party where it is certain that the party's identity will never become known.

While it is true that normally the inability to identify a tortfeasor would make litigation an exercise in futility, that is not true where the real party in interest is known and has appeared on

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[20] Justice Stewart's opinion also rejected the government's statutory argument that § 1391(e) "was designed only to govern venue and service of process, not to confer personal jurisdiction." 444 U.S. at 553 n.5.

behalf of the tortfeasor. Furthermore, at least one Circuit has now held that the 1976 amendment of 28 U.S.C. § 702, 90 Stat. 2721, permits the process of a federal court to directly reach the United States of America in a case such as this seeking nonmonetary damages. See Presbyterian Church v. United States, 870 F.2d 518 (9th Cir. 1989).[21] In reversing dismissal of a complaint against the United States for violation of the

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[21] Section 702 now reads:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, shall be entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party.

church's Fourth Amendment rights on sovereign immunity grounds, the unanimous Court of Appeals panel noted that "the clear objective of the 1976 amendment [to § 702] was to waive sovereign immunity as a defense in actions seeking relief other than money damages." Id. at 524. The court declared: "[T]he 1976 amendment is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." Id. at 525.[22] See Comment, Sovereign Immunity: A Modern Rationale in Light of the 1976 Amendments to the Administrative Procedure Act, 1981 Duke L. J. 116. See

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[22] The court cited legislative history to the effect that "the time [has] now come to eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." 870 F.2d at 525 (quoting H. Rep. No. 1656, 94th Cong., 2d Sess., reprinted in U.S. Code Cong. & Adm. News 6121, 6129 (1976)).

also, Webster, Beyond Sovereign Immunity: 5 U.S.C. Sec. 702 Spells Relief, 49 Ohio St. L. J. 725 (1988).

If the Ninth Circuit is correct, any possible justification for the ruling below evaporates. Even though the United States had not been specifically named as a defendant, it was the real party in interest under count 3 of the Complaint, and its attorney, the United States Department of Justice, provided representation for all defendants. Under the circumstances, it would elevate form over substance to approve dismissal of the complaint on the ground that the real party in interest had not been listed in the caption. See Bowman v. United States Department of Agriculture, 352 F.2d 281, 283 (5th Cir. 1965). Furthermore, 28 U.S.C. § 1653 permits amendments of complaints, even on appeal, to cure jurisdictional defects, and has been used

to authorize amendments to add real parties in interest as defendants. International Brotherhood of Boilermakers v. Local Lodge D354, 897 F.2d 1400 (7th Cir. 1990); Bowman, supra, 352 F.2d at 283. Cf. Newman-Green, Inc. v. Alfonzo-Larrain, 109 S. Ct. 2218, 2222 (1989) ("[E]very Court of Appeals that has considered the scope of § 1653 has held that it allows appellate courts to remedy inadequate jurisdictional allegations, but not defective jurisdictional facts.")[23] See also Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), holding that "a cause of action is a species of property" protected by the Due Process Clause which

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[23] In view of the fact that the Court of Appeals dismissed count 3 on a ground not relied upon by the District Court, it would not be wholly inappropriate for this Court to remand for consideration of the question of amending the caption. On the other hand, it would probably be "a waste of time and resources." Compare Newman-Green v. Alfonzo-Larrain, 109 S. Ct. at 2226.

may not be denied for procedural technicality "unless the balance of state and private interests favors the government scheme." Id. at 430 n.5.

Furthermore, the dismissal of the complaint because of the refusal of the real party in interest to provide information necessary to determine actual personal jurisdiction over the named defendant raises important issues as to the scope of this Court's ruling in Insurance Corp. of Ireland v. Compagnie de Bauxites de Guinee, 456 U.S. 694 (1982), holding that a federal court could infer the facts necessary to establish personal jurisdiction where a defendant resisted discovery of facts relevant thereto.

Finally, the ruling below raises substantial issues concerning the duty of federal courts to provide redress when a litigant demonstrates a prima facie case

of violation of constitutional rights. The provision of judicial redress for such wrongs was described by this Court in Marbury v. Madison, 1 Cranch 137, 163 (1803), as "the very essence of civil liberty," a principle that was reaffirmed in Bivens, 403 U.S. at 397. The conclusion of the court below that such redress could be denied by the unilateral action of the real defendant in interest, would appear to raise the most fundamental questions about the nature and function of judicial review under the United States Constitution, questions which demand examination by this Court.

CONCLUSION

For the reasons stated herein the petition for certiorari should be granted.

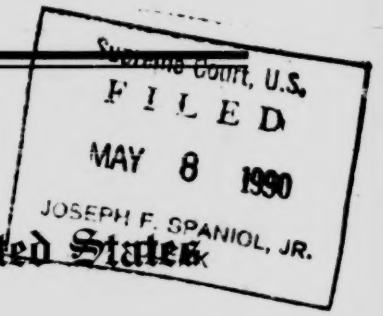
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89-1734

No. 89- _____



IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

TODD PATTERSON

Petitioner,

—v.—

FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government and JOHN DOE AGENCY, an unknown agency of the United States Government

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Filed: January 8, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5342 and 89-5781

TODD PATTERSON, A MINOR suing by his father, EDGAR PATTERSON

vs.

FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government and JOHN DOE AGENCY, an unknown agency of the United States Government

Todd Patterson

Appellant in Nos. 89-5342 and No. 89-5781

Appeal from the United States District Court for the District of New Jersey (D.C. Civil No. 88-2319)

Argued
November 9, 1989
Before: MANSMANN and GREENBERG, Circuit Judges, and

GAWTHROP, District Judge.*
Opinion filed: January 8, 1990

(* Honorable Robert S. Gawthrop, III, of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.)

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OPINION OF THE COURT

MANSMANN, Circuit Judge.

These appeals were born of the ambitious efforts of a sixth grade elementary school student who, in the lawful exercise of his constitutional rights, caused himself to be the subject of an investigation by the Federal Bureau of Investigation ("FBI"). The appeals constitute yet another illustration of the competing need for disclosure of information by government agencies and the need to prevent injury to the national security.

Todd Patterson ("Todd") appeals from the district court's orders granting summary judgment to the FBI and denying his post-trial motion filed pursuant to Federal Rule of Civil Procedure 60(b).[1]

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1. The appeals, filed separately from each order, were consolidated for

We hold that the information Todd seeks from the federal agency was properly exempt from disclosure. Therefore, we will affirm the judgment of the district court.

I.

In 1983, Todd, then a sixth grade elementary school student, embarked on a precocious endeavor to write an encyclopedia of the world as part of a school project. Deciding that his school's resources were inadequate, Todd wrote to 169 countries requesting information. Significantly, Todd enclosed much of this correspondence in envelopes bearing the return address of Laboratory

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disposition by order of the Clerk.

Disposable Products, a business Todd's parents operated from their home.

The flood of international correspondence engendered by the project attracted the attention of the FBI by means and methods undisclosed by the FBI. In late 1983, an FBI agent appeared unannounced at Todd's home. The agent spoke to Todd's parents concerning Todd's activities and was shown the correspondence received in response to Todd's requests. Soon after the visit, Todd contacted the FBI agent and spoke with him regarding the school project and the information requests to other countries.

As a result of the school project and

the visit by the FBI agent, the FBI came to maintain a file on Todd.[2] The file contained a directive for the FBI's Newark Division to conduct an appropriate investigation of Laboratory Disposable [redacted]oducts in accordance with Attorney General Guidelines. Also included in the file is a memorandum, prepared on or about February 23, 1984, that changed the subject heading from "Laboratory Disposable Products" to "Todd Patterson." The memorandum contains a description of Todd's project and states "Newark indices as well as local criminal checks negative

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2. The parties dispute the actual number of files. It is clear from the record that at least one file was created. Todd, however, insists that at least six files exist. This was also the district court's conclusion.

on subject" and "[i]n view of the above, Newark contemplates no further investigation in this matter." 705 F.Supp. 1033, 1037 (D.N.J. 1989).

The FBI maintains that it conducted no further investigation after 1983.[3] However, a document released by the FBI dated December 5, 1985, along with five attachments not released, demonstrate that as of that date some entity of the United States Government continued to monitor Todd's activities. Todd insists that surveillance remained in effect because he continued to receive pieces of mail in

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3. Todd subsequently received an invitation from the Soviet Mission in New York to visit their facility, which he did after voluntarily contacting the FBI. He was requested to and did contact the FBI following his visit.

damaged condition. In addition, Todd and his parents report hearing strange background noises on their telephones since 1983.

In April, 1987, Todd requested, pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552 (1982), access to records the F.B.I. in Washington, D.C. might be maintaining on him. Todd was informed that the information he requested was exempt from disclosure under 5 U.S.C. § 552(b)(1) and 5 U.S.C. § 552a(j)(2). Todd appealed the denial of his FOIA request to the Department of Justice, Office of Information and Privacy, where the determination was upheld. Thereafter, Todd filed a second FOIA request, this time directed to the FBI's Newark Field

Office.[4]

In May 1988, Todd initiated a civil suit against defendants FBI, John Doe (an unknown employee of the United States Government), and John Doe Agency (an unknown agency of the United States Government). Todd sought injunctive relief, damages, and disclosure of the requested documents. The complaint presented three distinct causes of action: (1) failure to comply with FOIA; (2) violations of the Privacy Act; and (3) violation of Todd's First and Fourth Amendment rights and of 18 U.S.C. § 1702

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4. FOIA requests made to the FBI are limited to files maintained at either the FBI headquarters or the individual field office where the request is made. Appellee's brief at 27.

and 19 U.S.C. § 482, statutes relating to the U.S. Mail.

The FBI responded initially to the complaint by offering to expunge Todd's name from its records. The offer was never accepted.[5] Thereafter, the FBI filed a motion for summary judgment on the first and second causes of action, reasserting that the requested information was exempt from disclosure. As to the third cause of action, the FBI moved to dismiss pursuant of Fed. R. Civ. P. 12(b)(2). Following oral argument on the motion and in camera review of the withheld documents, the district court

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5. The FBI indicated at oral argument that the offer remained open. Todd's position, voiced by his attorney, was that he was unwilling to accept the offer without first reviewing the documents.

granted summary judgment to the FBI on February 7, 1989, on all three causes of action.[6] 705 F.Supp. 1033 (D.N.J. 1989). Todd thereafter filed a motion, pursuant to Fed. R. Civ. P. 60(b), to vacate the judgment or in the alternative to supplement the record which was denied by the district court on August 18, 1989. We have jurisdiction to review the grant of a motion for summary judgment and the denial of a Rule 60(b) motion pursuant to 28 U.S.C. § 1291.

II.

A.

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6. Because it had considered matters outside the pleading, the district court considered the motion to dismiss the third cause of action as one for summary judgment. See infra part II.C.

Todd challenges the procedures employed by the district court in its adjudication of the alleged FOIA violation. In particular, Todd contents that the record does not justify the district court's use of an in camera affidavit and its further in camera examination of withheld documents.

In Lame v. United States Dept. of Justice, 654 F.2d 917, 922 (3d Cir. 1981), we expressly authorized the use of in camera affidavits and submissions. We noted that in the ordinary case, "a Vaughn index correlating justifications for non-disclosure with the particular portions of the documents requested will generally suffice to narrow the disputed issues and permit a reasoned disposition by the

district court." Lame, 484 F.2d 820, 827 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).[7]

However, there are cases, albeit unusual, where the preparation of a detailed Vaughn index would require an agency to disclose the very information that it seeks to withhold. Under these circumstances, we require an agency to submit a public affidavit setting forth, in as detailed terms as possible, the basis for the claimed exemption. Lame, 654 F.2d at 921. The district court must strive to make the public record as

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7. A Vaughn index is an affidavit which supplies an index of withheld documents and details the agency's justification for claiming exemption. See Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974).

complete as possible, soliciting as much information as can be willingly released by the agency. If, however, "the agency is unable to articulate publicly the specific disclosure it fears and the specific harm that would ensue, then in camera inspection of a more detailed affidavit must be resorted to." See Ferri v. Bell, 645 F.2d 1213, 1224 (3d Cir. 1981), opinion modified, 671 F.2d 768 (3d Cir. 1982); Phillippi v. Central Intelligence Agency, 546 F.2d 1009, 1013 (D.C. Cir. 1976). Moreover, to the extent that any public affidavits may appear sufficiently descriptive, it may nonetheless be necessary for the district court to examine the withheld documents in

camera to determine whether the agency properly characterized the information as exempt. 5 U.S.C. § 552a(4)(B); Lame 654 F.2d at 921; Ferri, 645 F.2d at 1222; see also Phillippi, 546 F.2d at 1012 (FOIA clearly contemplates that courts will resolve fundamental issues in contested cases on the basis of in camera examination of relevant documents).

We believe the procedural events in the case sub judice are in accord with those procedures outlined above. In seeking discovery from the FBI, Todd propounded interrogatories questioning, inter alia, the internal investigatory procedures of the FBI and the identities of the persons and agencies assigned to Todd's case. The FBI provided answers to

a few of the interrogatories, however, in most instances it claimed exemption from disclosure under the states military secrets privilege and 5 U.S.C. § 552(b)(1) and § 552(b)(7)(c) of the FOIA. In support of its claim of privilege, the FBI submitted the public affidavits of Special Agents Lieberman, Thomas, and Thorton. The purpose of the Thomas affidavit was to provide the district court with a Vaughn index for the records requested by Todd and withheld by the FBI. Lieberman's affidavit describes the withheld documents and sets forth justifications for those withholdings under the FOIA. Lastly, the Thorton affidavit states that the Patterson premises had never been the

subject of electronic surveillance and the FBI was innocent of opening intercepting any mail directed to the Pattersons.

Ostensibly, the district court found that these affidavits constituted sufficient proof of the privileged nature of the withheld information, for it was not until after oral argument on the FBI's motion for summary judgment that in camera inspection was ordered. Indeed, the district court's order directing the ex parte review indicated the following:

> because certain issues were raised in oral argument that were not adequately addressed in the supporting papers, I have concluded that in camera inspection of certain withheld documents is required in order for this Court to assure itself that the FBI has acted in good faith with regard to its investigation of Todd Patterson, that the FBI complied with all relevant government

> regulations, and that the FBI engaged in no illegal conduct.

This in camera review was necessary with respect to only two documents.

The FBI complied with the order by submitting all of the unredacted documents at issue as well as the declaration of James Geer, the FBI Assistant Director in charge of the Intelligence Division. Geer's declaration was provided as "an explanatory affidavit that goes into more detail than the public affidavits." The FBI also filed publicly the Declaration and Claim of Privilege of Attorney General Thornburgh so as to assert formally the state secrets privilege.[8]

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8. The state secrets privilege was first recognized in United States v. Reynolds, 354 U.S. 1 (1953). As explained by the Court,

> [i]t may be possible to satisfy the

Thus, the public record consisted of certain redacted documents initially released by the FBI, a few answers to interrogatories, and four affidavits. Not surprisingly, these materials did not allay Todd's interest in the FBI's files. Under the circumstances, however, we believe the public submissions represent a good faith effort by the FBI to provide as much access to the information as

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> court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

345 U.S. at 10.

possible. We can appreciate Todd's objections to the anomalous situation of having to defend against a motion for summary judgment without being privy to the very documents necessary for such a defense. The Court of Appeals of the D.C. Circuit, which has considered a significant number of FOIA cases, has commented on how this "lack of knowledge by the party seeing [sic] disclosure seriously distorts the traditional adversary nature of our legal system's form of dispute resolution." Vaughn, 484 F.2d at 824.[9] However, the remedy for the

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9. We note that notwithstanding this imbalance between the parties, the D.C. Circuit, as well as other circuits, have allowed the use of in camera affidavits in national security cases. See e.g., Molerio v. F.B.I., 749 F.2d 815 (D.C. Cir. 1984); Fitzgerald v. Penthouse Intern., Ltd., 776 F.2d 1236 (4th Cir. 1985);

unfairness is an in camera examination by the trial court of the withheld documents and any supporting or explanatory affidavits. Inasmuch as the record was made as complete as possible in this instance, we hold that the proper predicates for accepting records and affidavits in camera were satisfied in this case.

Irrespective of the district court's in camera review, Todd argues that summary judgment should not have been granted because the FBI failed to sustain its burden to show the sensitive nature of its

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Jabara v. Webster, 691 F.2d 272, 279 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983); and Hayden v. N.S.A., 608 F.2d 1381 (D.C. Cir. 1979).

withheld documents. In reviewing the grant of summary judgment in proceedings seeking disclosure of records under the FOIA, this court's scope of review is two-fold: we must determine whether the district court had an adequate factual basis for its decision and whether its conclusion was clearly erroneous. Cuccaro v. Secretary of Labor, 770 F.2d 355 (3d Cir. 1985); Lame v. United States Dept. of Justice, 767 F.2d 66 (1985).

The FBI invoked two exemptions in support of its denial of Todd's FOIA request. The first exemption provides that documents which are "specifically required by Executive Order to be kept secret in the interest of the national defense of foreign policy," are exempt

from disclosure. 5 U.S.C. § 552(b)(1)(1982). In support of its position, the FBI submitted the Thomas affidavit which identifies the relevant Executive Order in this case as being the Executive Order on National Security Information, No. 12356, 3 C.F.R. 166 (1983). Reviewing the Thomas affidavit in conjunction with Executive Order 12356, the district court found, and we agree, that the FBI adhered to the procedural requirements of the Executive Order when the withheld FOIA material was classified.

Next, the affidavit indicates that the documents sought by Todd contain information made eligible for classification by § 1.3(a)(4) of the

Executive Order. Particularly, § 1.3(a)(4) provides that information shall be considered for classification if it concerns "intelligence activities (including special activities), or intelligence sources or methods." 3 C.F.R. 169. This section must be read in conjunction with § 1.3(b):

> Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

Id.

The remainder of the affidavit includes Thomas' description of the documents, the location of the classified

portions, and his assertions that the material satisfies the classification criteria of § 1.3(a)(4) and ultimately presents a threat to the national security. The district court found Thomas' assertions deficient in only two respects. The district court found his references to Documents No. 4 and 5 to be unduly vague and repetitive. Upon in camera inspection of the material, however, the court was convinced that release of the withheld material reasonable could be expected to cause damage to the national security.

We conducted our own in camera review of the documents and accompanying Geer affidavit, mindful that when dealing with documents to which § 552(b)(1) applies

courts are expected to accord "substantial weight" to the agency's affidavit. See American Friends Serv. Com. v. Department of Defense, 831 F.2d 441, 444 (3d Cir. 1987); see also S. Rep. No. 1200, 93d Cong. 2d Sess. 12 (1974), reprinted in 1974 U.S. Code Cong. & Admin. News 6267, 6290. We find that the district court's decision has an adequate factual basis and even on a plenary review we agree with it.[10]

The second exemption invoked by the FBI was § 552(b)(7)(c), which exempts from disclosure:

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10. On the basis of our in camera review of the documents we have no hesitation in stating that there is nothing derogatory in them regarding Todd or any member of his family.

> (7) investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would...
> (c) constitute an unwarranted invasion of personal privacy...

5 U.S.C. § 552 (b)(7)(c).

In considering this claim, the district court was required to engage in a de novo balancing test: "weighing the public benefit which would result from the disclosure against the privacy interest and the extent to which it is invaded." Cuccaro, 770 F.2d at 359. In view of its finding that the FBI had not participated in any illegal conduct, the district court concluded that only a negligible benefit would inure to the public by releasing the names of FBI personnel. As a result of our independent examination of the

documents, we find that the district court's conclusion is correct.

Todd also maintains that the blanket exemption from release of the requested documents and the Geer affidavit was overbroad, and that all segregable, non-sensitive portions of the withheld documents should have been released. Our rule in this circuit is that, in response to a FOIA request, "[a]ny reasonably segregable, non-exempt portion of a record is to be made available to the person requesting that record." Lame, 654 F.2d at 921. In this case, the FBI did release certain papers in which extensive redaction was necessary. Those documents completely withheld were simply inappropriate for partial redaction,

except in one instance. The Geer affidavit contains some non-classified portions which could have been disclosed. Responding to questions propounded by this court at oral argument, the FBI admitted that the entire Geer affidavit need not have been withheld. However, the FBI explained that the non-classified parts of that document were available to Todd and disclosure would be made upon request. We are not convinced that earlier disclosure of these non-classified parts would have affected the outcome of the case. Future disclosure will at least assuage some of Todd's curiosity.[11]

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11. The district court denied Todd's request to have his attorney present at the in camera proceedings. Although Todd alleges error on appeal, we find that the issue merits no further discussion.

B.

Todd argues that the FBI violated his rights under the Privacy Act, 5 U.S.C. § 552a(e)(7) by collecting information about his protected correspondence with foreign governments and by maintaining records of his protected activity in permanent, retrievable files indexed to his name. The FBI counters with the assertion that under § 552a(e)(7) of the Act the requested records are exempt from disclosure.[12] Concluding that the records

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12. The FBI's counter-argument in the district court was that its central record system is exempt under § 552a(j)(2). The district court rejected this contention, finding that the FBI had failed to show that its records on Todd were compiled specifically for purposes of a criminal investigation. This particular argument has been abandoned by the FBI on appeal.

were entitled to exemption, the district court granted the FBI summary judgment on the second cause of action of Todd's complaint.

Our scope of review of the district court's determination with respect to disclosure under the Privacy Act on summary judgment is the same as that utilized initially by the district court. We must decide whether there exists a genuine issue as to any material fact in dispute, assuming resolution of any disputed fact in favor of the party opposing the motion, and determine whether the moving party is entitled to judgment as a matter of law. Cuccaro, 770 F.2d at 357.

Initially, and as a question of first impression in this circuit, we must interpret the meaning of a portion of § 552a(e)(7). Section 552a(e)(7) prohibits federal agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activitity." 5 U.S.C. § 552a(e)(7)(emphasis added). The precise meaning of the emphasized portion is not defined by the statute itself. The district court compared the decisions of other circuits which have interpreted this particular section and adopted a rule

requiring agencies "to demonstrate that any and all records maintained on an individual's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the agency, an that there exists a sufficient basis for the maintenance of such records." 705 F.Supp. at 1043 (emphasis in original). It is this definition that the parties now dispute. Todd argues that agencies should be made to show a "substantial relationship" between the records and the government activity. He insists that a "relevancy" standard acts to dilute his First Amendment rights.

Congress's intent, as revealed in the statute's legislative history, is for §

552a(e)(7) to prevent "collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." S. Rep. No. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 697. The history also instructs:

> that the kind of information about individuals which an agency seeks to gather or solicit, and the criteria for programs to investigate individuals will be judged by an official at the highest policy making level to be relevant and necessary to a statutory purpose of the agency.

1974 U.S. Code Cong. & Admin. News 6916, 6960 (emphasis added).

Only four court of appeals have expressed an opinion as to the standard

warranted when evaluating a claim under § 552a(e)(7). The Court of Appeals for the Fourth Circuit has held that Section (e)(7) is violated "to the extent that the [agency] has engaged in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violation of the statutes which it is authorized to enforce..." Clarkson v. I.R.S., 678 F.2d 1368, 1375 (4th Cir. 1982), cert. denied, 481 U.S. 1031 (1987). A case-by-case analysis of whether an agency's actions were pertinent to authorized law enforcement activity was adopted by the court in MacPherson v. I.R.S., 803 F.2d 479 (9th Cir. 1986). Section (e)(7) was interpreted by the Sixth Circuit as

allowing "investigation with respect to the exercise of first amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." Jabara v. Webster, 691 F.2d 272, 279 (6th Cir. 1982), cert. denied 464 U.S. 863 (1983) (emphasis added). The Jabara standard was adopted in Nagel v. U.S. Dept. of Health, Education and Welfare, 725 F. 2d 1438, 1441 n.3 (D.C. Cir. 1984).

In our view, a relevancy standard is more consistent with Congress's intent and will prove to be a more manageable standard than employing one based on ad-hoc review. The weight of authority supports a rule requiring a federal agency

to establish some nexus between its files and classified activities. A burden as heavy as that suggested by Todd has never been imposed. We, therefore, hold that a federal agency defending its maintanance of records under Section (e)(7) must demonstrate that its records on an individual's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the agency. Thus, the district court's interpretation of the section was legally correct.

Applying this standard to the FBI's records, especially the Geer affidavit, we are persuaded, as was the district court, that the records maintained by the FBI on Todd's exercise of First Amendment rights are relevant to an authorized law

enforcement activity of the FBI. Continued maintenance of such records also will not violate any provision of the Privacy Act. Accordingly, with no issue of material fact to resolve, the district court properly entered summary judgment.

C.

The FBI filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(2) as to Todd's third cause of action, arguing that in actions instituted in federal court under federal law, courts have eliminated fictitious defendants by motion. In his motion in opposition to the summary judgment motion, Todd maintained that pleading fictitious defendants was allowable until such time as the real

parties in interest, who could only be identified through further discovery, could be substituted. The district court found, as a matter of fact, that the FBI and any FBI or other government employees involved in activities concerning Todd has acted in accord with all applicable statutory, regulatory, and administrative guidelines. Further, the district court held that the FBI had properly invoked the state secrets privilege in defense to Todd's interrogatories. Because these findings were made by considering matters outside the pleadings, i.e., documents submitted for in camera review, the district court converted the motion to dismiss into one for summary judgment, as is authorized for Rule 12(b)(6) motions,

and entered judgment in favor of the FBI. Todd contends that in treating the Rule 12(b)(2) motion as one for summary judgment, the district court denied him the opportunity to properly defend his position on merits. The FBI concedes procedural error but insists that it is "plainly harmless."

We have had occasion to consider the procedural distinction between a Rule 12(b)(6) motion and a Rule 12(b)(2) motion. In Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61 (3d Cir. 1984), we explained the mechanics of a Rule 12(b)(2) motion as follows:

> A Rule 12(b)(2) motion, such as the motion made by the defendants here, is inherently a matter which requires resolution of factual issues outside

> the pleadings, i.e. whether in personam jurisdiction actually lies. Once the defense has been raised, then the plaintiff must sustain its burden of proof in establishing jurisdictional facts through sworn affidavits of other competent evidence. Contrary to the dissent's suggestion, therefore, at no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss for lack of in personam jurisdiction. See International Ass'n of Machinists & Aerospace Workers v. Northwest Airlines, 673 F.2d 700 (3d Cir. 1982). Once the motion is made, plaintiff must respond with actual proofs, not mere allegation.

Time Share Vacation Club, 735 F.2d at 67 n.9.

In support of this motion, the FBI submitted the Thornton, Thomas and Lieberman affidavits and its answers to interrogatories. Following oral argument on the motion, the FBI produced the Geer

affidavit and the total collection of withheld documents. These materials, they contended, clearly evidenced the nonparticipation of the FBI in any mail cover activity. To the extent that the materials revealed the identities of another agency or agencies whose operations concerned Todd's mailings, the FBI asserted the state secrets privilege to prevent disclosure. Todd's case consisted of the affidavits of himself and his mother asserting that he had received damaged mail.

A careful reading of the district court's opinion suggest that the court by implication decided that an action could at least be initiated against a John Doe defendant. Such a determination, however

begs the question whether Todd could receive any further meaningful discovery, so as to ultimately identify the real parties in interest, in light of the FBI's assertion of the state secrets privilege. Finding that "a 'reasonable danger' that harm to the national interest will ensue if defendants are forced to comply with plaintiff's discovery requests," the district court held that the state secrets privilege had been properly invoked. 705 F.Supp. 1046. The district court then reasoned that if the record contained no evidence of abuse by the FBI, and the privilege applied to other information known to the FBI, then the case presented no issue of material fact and should be

dismissed accordingly.

A Rule 12(b)(2) motion cannot be treated as one for summary judgment. There are situations, however where "the question of the district court's jurisdiction [is] entwined with the ultimate question on the merits." International Ass'n of Machinists v. Northwest Airlines, 673 F.2d 700, 710 (3d Cir. 1982). In such circumstances, it may be necessary for the district court "to proceed to a decision which impacts on the merits." Id,; see also Land v. Dollar, 330 U.S. 731, 739 (1947) (district court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits).

The facts of this case present this

type of complicated review. At the time the Rule 12(b)(2) motion was filed, Todd had already received certain redacted papers, three affidavits and answers to interrogatories. After in camera review of the withheld documents, the district court concluded that Todd could not secure any further discovery. The John Doe defendants would thus remain unknown. Since they suit could not be maintained against a fictitious party, the district lacked in personam jurisdiction.

We find it insignificant that the district court treated the Rule 12(b)(2) motion as one for summary judgment and dismissed the cause of action for lack of a genuine issue of material fact.[13] Such

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13. We can affirm, if the result reached by the district court is correct,

a finding is beyond the initial and necessary inquiry of whether in personam jurisdiction actually lies. The FBI's evidence, both public and in camera materials, convinces us that (1) the FBI is not of the John Doe Defendants, and (2) the FBI is shielded from further disclosure by the state secrets privilege. Todd thus failed to sustain his burden or proof in establishing in personam jurisdiction. Accordingly, the cause of action was properly dismissed.

D.

An order denying a motion for relief

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even though our reasoning differs from that of the district court. See Tunnell v. Wiley, 514 F.2d 971, 975 n.4 (3d Cir. 1975).

from judgment pursuant to Fed. R. Civ. P. 60 is reviewed for abuse of discretion. Laskey v. Continental Products Corp., 804 F.2d 250 (3d Cir. 1986). In view of the facts of this case, we find no evidence that the district court abused its discretion in denying Todd's Rule 60(b) motion.

III.

For the foregoing reasons, we will affirm the judgment of the district court in both appeals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TODD PATTERSON, etc.,	:	Civil Action No. 88-2319
Plaintiff,	:	
v.	:	
FEDERAL BUREAU OF INVESTIGATION, et al.,	:	O P I N I O N
Defendants.	:	

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(Attorneys for Defendants)

WOLIN, District Judge

Currently before the Court is the motion of defendant Federal Bureau of Investigation ("FBI") for summary judgment as to the first and second causes of action of plaintiff Todd Patterson's complaint and to dismiss the third cause of action. For the reasons set forth below, and after having reviewed in camera documents withheld by the FBI, the Court grants summary judgement in favor of the FBI dismissing the first, second and third causes of action of plaintiff's complaint. However, in consideration of the FBI's offer to expunge the name of plaintiff from any files it may possess, the Court encourages the FBI to abide by its offer and to expunge the plaintiff's name from all files, indexes or records maintained

by the FBI that encompass the First Amendment activities of Todd Patterson.

I. BACKGROUND AND PROCEDURAL HISTORY

The facts of this case vividly illustrate the parental concern and public consternation which can be produced when the apparently remote world of high-tech intelligence and counter-intelligence is applied to the everyday world of grade school and school projects in the name of national security.

In 1983, plaintiff Todd Patterson, then a sixth grade elementary school student, decided to write an encyclopedia of the world. Not being content with the local library's resources, Todd undertook to write to all the countries of the world, 169 in all, to obtain information. Significantly, plaintiff enclosed much of

his correspondence in envelopes bearing the return address of Laboratory Disposable Products, a business Todd's parents operate from their home.

The flood of international correspondence which Todd's project engendered apparently caught the eye of the FBI, through means and methods which the FBI does not wish revealed on account of national security concerns. Todd and his parents contend that many pieces of mail from foreign countries were received in damaged condition, particularly mail from the Soviet Union. The FBI, through affidavits and other supporting papers, denies any responsibility for opening or damaging Todd's mail.

What is undisputed is that, besides mail, Todd's project also caused Todd to receive a visit from the FBI. In late

1983, Agent John E. Butenschoen, from the FBI's Parsippany, New Jersey branch, appeared unannounced at the plaintiff's home in North Haledon, New Jersey. Agent Butenschoen spoke to Todd's mother and father, the latter by telephone, concerning Todd's project. Agent Butenschoen was shown Todd's room, the correspondence received by plaintiff, and the purpose Todd was using the correspondence for.

Agent Butenschoen requested that plaintiff, who was at elementary school at the time of the visit, call the agent. Soon after the visit, Todd did call Agent Butenschoen and spoke with him regarding plaintiff's project and his information requests to other countries.

As a result of Todd's project and the visit by Agent Butenschoen, it is clear

that the FBI came to maintain at least one file on the plaintiff. Lieberman Affidavit, p. 7. On or about July 13, 1983, an FBI airtel was written relating to Laboratory Disposable Products. The document requested that the Newark Division "conduct appropriate investigations regarding the captioned company in accordance with Attorney General Guidelines." Defendant's Notice of Motion for Summary Judgment, Exhibit B, Document No. 1.

After Agent Butenschoen's visit to Todd's home, and apparently as a result of his investigation of the matter, an FBI memorandum was written on or about February 23, 1984. Defendants' Notice of Motion for Summary Judgment, Exhibit B. Document No. 2. This document changed the subject heading from "Laboratory

Disposable Products" to "Todd Patterson." The memorandum contains a description of Todd's project and further states "Newark indices as well as local criminal checks negative on subject" and "[i]n view of the above, Newark comtemplates no further investigation in this matter." The memorandum demonstrates that once the FBI learned the source of the international correspondence was not an entity called "Laboratory Disposable Products" but was in reality a seventh grader involved in a school project, the FBI wisely concluded that no espionage was being committed.

While Agent Butenschoen's visit to the Pattersons and the February 23, 1984 memorandum should have been the end of the matter, the Patterson's involuntary foray, whether real or imagined, into the world of counter-intelligence and national

security was not yet complete. During the summer of 1984, Todd Patterson received an invitation for a visit from the Soviet Mission in New York City. Concerned that the FBI was somehow monitoring plaintiff's activities, plaintiff's father requested that Todd contact Agent Butenschoen. Todd did so and informed the agent of the invitation. The agent requested that Todd report back to him after the visit. Affidavit of Todd Patterson, p. 3. Todd's visit to the Soviet Mission and his subsequent "de-briefing" apparently went off without incident.

The FBI continues to maintain that it conducted no further investigation of plaintiff after 1983. Defendant's Reply Memorandum, p. 3. However, an airtel dated December 5, 1985, released by the FBI, along with five attachments that were

not released, demonstrates that as of that date some entity of the United States Government continued to conduct activities that involved the plaintiff. Defendant's Notice of Motion, Exhibit B, Document No. 5. The FBI responds, somewhat cryptically, that "[t]he specifics of how that 1985 airtel information came to the FBI is, of course, covered by the military and state secrets privilege, but it was not through any further investigation by the FBI." Defendant's Reply Memorandum, p. 3.

Finally, throughout the entire period of plaintiff's contact with the FBI and other unknown forces of counter-intelligence, up to the present, plaintiff maintains that at least 50 pieces of mail have been received in damaged condition, most of which originated in the Soviet

Union. Plaintiff's Statement of Material Facts, ¶9. Plaintiff and his parents also report of hearing strange background noises on their telephones since 1983. Indeed, a now deceased employee of the Pattersons is said to have heard a voice say "Operator, this is not the phone I want tapped." Id. at ¶16.[14] The FBI strenuously refutes the Patterson's allegations of mail tampering and wiretapping, and the FBI characterizes the employee's story as an attempt to feed "Mr. Patterson's paranoid fantasy of governmental wiretapping." Defendant's Reply Memorandum, p. 2.

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14. The Court notes that the employee's story, while ominous sounding, is inherently unreliable and, because of the employee's death, inadmissible hearsay.

In early 1987, plaintiff learned that he could request access to records the FBI might be maintaining on him through use of the Freedom of Information Act ("FOIA").[15] Pursuant to FOIA, plaintiff made a request to the FBI in Washington, D.C. for "copies of my personal file in your records." Exhibit A-7 to defendant's notice of motion for summary judgment. By letter dated August 12, 1987, plaintiff was informed that "[t]he information pertaining to you in FBIHQ records is exempt from disclosure pursuant to Title 5, United States Code, Section 552(b)(1) and Title 5, United States Code, Section

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15. 5 U.S.C. §552 (1982 & Supp. II (1985) (as amended by Freedom of Information Reform Act of 1986, Pub. L. No. 99-570, Subtit. N, §§1801-1804, 100 Stat. 32076, 3248-3250 (1986)).

552a(j)(2)."

Plaintiff appealed the denial of his FOIA request by letter from his father to the Department of Justice's Office of Information and Privacy. On October 20, 1987, Richard L. Huff, co-director of the Office of Information and Privacy, notified plaintiff that his FOIA appeal had been denied. Plaintiff was also notified of his right to seek judicial review of the agency's determination in the United States District Court. One month later, Huff wrote to inform the Pattersons that, after a further review of Todd's request, six pages of the plaintiff's file were being declassified. Exhibit A-11. In March, 1988, plaintiff

initiated a second FOIA request, this time directed at the FBI's Newark Field Office. In May of 1988, Todd initiated a civil suit through his father, Edgar Patterson, against defendants FBI, John Doe, an unknown employee of the United States Government, and John Doe Agency, an unknown agency of the United State Government.[16] Plaintiff's suit seeks injunctive relief and/or damages under

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16. Plaintiff's suit originally concerned only plaintiff's FOIA request to the FBI's Washington office. However, in the interests of judicial economy, this Court and defendant are treating plaintiff's second FOIA request as part of this action, and the FBI has released the pertinent de-classified documents, in redacted form, complying with plaintiff's second request, and has included the justification for the redactions in the declarations and motions filed in this action. Defendant's Supporting Memorandum, p. 2, n. 1.

three distinct causes of action: failure to comply with FOIA; violations of the Privacy Act, 5 U.S.C. §552a et seq., as a result of the FBI's maintenance of files describing plaintiff's exercise of rights guaranteed by the First Amendment; and violations of plaintiff's First and Fourth Amendment rights and of 18 U.S.C. §1702 and 19 U.S.C. §482, statutes relating to the U.S. mail.

On September 26, 1988, the FBI filed the summary judgment motion now before the Court. At the close of oral argument on defendant's motion, the Court reserved decision and ordered the defendant to submit an in camera affidavit establishing a rational link between specific law enforcement objectives and statutes and

the files which the FBI maintained on the First Amendment activities of the plaintiff. Subsequent to oral argument, the Court further ordered that the FBI submit to the Court for in camera inspection certain specified documents which the FBI is seeking to withhold from the plaintiff. Letter and Order, December 30, 1988 (attached as Appendix A to this Opinion). The FBI responded to the Court's order by submitting for in camera inspection by the Court the entire content of records maintained by the FBI concerning plaintiff's FOIA request. The defendant also formerly invoked the military and state secrets privilege in response to discovery sought by the

plaintiff by means of an affidavit of Attorney General Dick Thornburgh dated January 13, 1989.

DISCUSSION

A. Plaintiff's FOIA Claim

In all FOIA cases, the role of the District Court is to review de novo all agency claims that material requested pursuant to FOIA is subject to an exemption contained in the statute.[17] In such a case, the agency bears the burden of justifying its decision to withhold requested information.[18] King vs. U.S. Dept. of Justice, 830 F.2d 210, 217 (D.C. Cir. 1987); Miller v. Casey, 730 F.2d 773,

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17. 5 U.S.C. §552(a)(4)(b) (1982).

18. Id.

776 (1984). The agency may meet this burden through the filing of affidavits that describe the material withheld and articulate why the material falls within the claimed exemption. King, 830 F.2d at 217; Military Audit Project v. Casey, 656 F.2d 724, 738 (1981). In the present case, the FBI claims that the withheld material falls under Exemption 1 of FOIA, relating to National Security, and Exemption 7, concerning protection of privacy.

1. Exemption 1 - National Security

Exemption 1 of FOIA enables an agency to refrain from disclosing information that is "specifically authorized under criteria established by an Executive Order

to be kept secret in the interest of the national defense or foreign policy and...are in fact properly classified pursuant to such Executive Order." 5 U.S.C. §552 (b)(1). The relevant Executive Order in this case is Executive Order on National Security Information, No. 12356, 47 Fed. Reg. 14874, issued by President Reagan on April 2, 1982, becoming effective on August 1, 1982.

When determining if an agency has properly withheld information pursuant to Execption 1, a district court, as in all FOIA cases, must conduct a de novo review. However, both the legislative history of FOIA and the subsequent caselaw suggest that courts must "accord substantial weight to an agency's affidavit concerning

the details of the classified status of a disputed record" given that "executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure." Salisbury v. United States, 690 F.2d 966, 970 (D.C. Cir. 1982) (quoting S. Rep. No. 1200, 93 Cong. 2d Sess. 12 (1974) (conference report) reprinted in U.S. Code Cong. & Admin. News 1974, pp. 6267, 6290); accord King vs. U.S. Department of Justice, 830 F.2d at 217 ("The court owes substantial weight to detailed agency explanations in the national security context.").

Even with the substantial weight

standard, a court should grant summary judgment to an agency invoking Exemption 1 only if the agency supplies affidavits[19] that describe the withheld documents and the justifications for non-disclosure in sufficient detail and particularity so as to demonstrate that "material withheld is logically within the domain of the exemption claimed." King v. U.S. Department of Justice, 830 F.2d at 217. Moreover, a court should refrain from considering the agency affidavits dispositive if there is contradictory evidence in the record or if the specter

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19. An affidavit which supplies an index of withhold documents detailing the justification for exemption claims has come to be known as a Vaughn index. Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977, 94 S. Ct. 1564 (1974).

of agency bad faith is demonstrated to the court. Id.; Miller v. Casey, 730 F.2d at 776; Military Audit Project v. Casey, 656 F.2d at 738.

In the case at hand, the FBI has produced the affidavit of Special Agent Philip W. Thomas to serve as a Vaughn index with regard to the application of Exemption One to plaintiff's FOIA requests. As the relevant section of FOIA, 5 U.S.C. §552 (b)(1), requires, the Thomas affidavit seeks to demonstrate that the withheld material is under the purview of an Executive Order and has been properly classified pursuant to such order.

Taking the procedural requirement

first, the Court is satisfied that the Thomas affidavit sufficiently establishes that the FBI adhered to the procedural requirements of Executive Order 12356 when the withheld FOIA material was classified. EO 12356, §§1.5(a)(1)-(4), 1.6.

Turning to the substantive requirement of EO 12356, the Court must evaluate the merits of the Thomas affidavit's assertion that the withheld material fits under the classification criteria of EO 12356. The Thomas affidavit places its reliance on EO 12356, §1.3(a)(4), which provides:

> §1.3 Classification Categories
>
> (a) Information shall be considered for classification if it concerns:
> (4) intelligence activities including special activities),

> or intelligence sources or methods.

The above provision must be read in conjunction with EO 12356, §1.3(b):

> Information that is determined to concern one or more of the categories in Section 1.3(a) shall be classified when an original classification authority also determines that its unauthorized disclosure, either by itself or in the context of other information, reasonably could be expected to cause damage to the national security.

The FBI's choice to rely on the sources and methods classification category of the Executive Order struck the Court as eminently sensible considering the unlikelihood that any intelligence collected on a grade school student such as Tood would directly implicate the

security of the Republic. However, upon initial review, the Court was unconvinced that the Thomas affidavit sufficiently demonstrated that the material withheld by the FBI in response to plaintiff's FOIA request belonged under the purview of EO 12356 §1.3(a)(4), and that release of the withheld material reasonably could be expected to cause damage to the national security. In particular, the Court found that the Thomas Affidavit was unduly vague and repetitive in referring to the withholding of Document No. 4 in Exhibit B of the FBI's notice of motion, a one-page FBI airtel dated January 6, 1984, along with 17 attached pages, and Document No. 5, a one-page FBI airtel dated December 5,

1985, along with five attached pages.[20]

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20. The relevant protion of the Thomas affidavit states:

> (35) Document 4 has 17 separate attachments which are classified 'Secret' in their entirety. These attachments contain specific, detailed information provided by an intelligence source, method or activity. The information is of such detail that it may pinpoint a critical time frame, reflect a special vantage point, or reveal a style of reporting peculiar to that source, method or activity, any of which, if disclosed would reveal the source of the information. Thus exposed, the source's methods, or activity's effectiveness would be terminated and could reasonably be expected to result in identifiable damage to the national security. A further discussion of the types of damage to the national security has been previously set forth at Paragraphs 12-14, supra.
>
> ***
>
> (41) Document #5 has 5 separate attachments which are classified 'Secret' in their entirety. These attachments contain specific, detailed information provided by an intelligence source, method, or activity. The reasons for classifying this type of detailed

While mindful of the limitations faced by the FBI in its attempt to describe why classified material is exempt from FOIA, the Court was concerned that allowing the FBI's cursory description of 24 pages of withheld material to suffice would not comport with this Court's task of conducting a meaningful de novo review of defendant's decision to withhold material under FOIA. Therefore, the Court ordered the FBI to submit the relevant withheld material for in camera inspection, although cognizant of the presumption that recourse to in camera inspection of classified documents should not be resorted to lightly. See Church of

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information have been previously set forth at Paragraph 35, supra.

Scientology v. U.S. Department of the Army, 611 F.2d 738, 743 (9th Cir 1979) (citations omitted).

In this case, the Court found in camera inspection of the relevant documents to be the best means available to render substantial justice to plaintiff's claims, yet also insure that any legitimate intelligence activities, sources or methods of the government remain protected against public disclosure. Having now conducted such an in camera inspection of the original, withheld material and the additional affidavit of Assistant Director of the FBI James H. Greer ("Greer Affidavit"), the Court finds that the material withheld by

the FBI falls under the purview of EO 12356 §1.3(a)(4), and that release of the withheld material reasonably could be expected to cause damage to the national security.

An agency asserting the national security exemption to FOIA need not demonstrate that an actual or substantial risk to the national security would result if the requested material were to be released. All that is required is for the agency to make a plausible showing that release of withheld documents would create a reasonable expectation of damage to the national security. Halperin v. C.I.A., 629 F.2d 144, 149 (D.C. Cir. 1980). The withheld material, read in conjunction with the Greer affidavit, does establish a

logical connection between each withheld or redacted document and the risk that certain intelligence methods or sources would be compromised if the withheld material was released.

Furthermore, the Court is convinced that the representations of the FBI, as expressed in the Thomas and Greer Affidavits, are not controverted either by contrary evidence in the record or substantive evidence of agency bad faith, and that the FBI did not run afoul of EO 12356's warning that:

> In no case shall information be classified in order to conceal violations of law, inefficiency, or administrative error; to prevent embarrassment to a person, organization, or agency; to restrain competition; or to prevent or delay the release of information that does

> not require protection in the interest of national security.
>
> EO 12356, §1.6(a).

The plaintiff's allegation that much of his international correspondence arrived in damaged condition, when evaluated in conjunction with the documents inspected by this Court in camera, does not support a finding that the FBI illegally opened plaintiff's mail or create a genuine factual issue of whether any instrumentality of the United States Government illegally interfered with plaintiff's mail. The distance the mail traveled, the size and content of the envelopes, and the national origin of the mail are the far more likely culprits in assessing why plaintiff's mail may have

arrived in damaged condition. Also, plaintiff's allegation of electronic eavesdropping is not substantiated by any substantive, credible or admissable evidence, and, as such, cannot support any finding of bad faith on the part of the FBI.

It is unfortunate that plaintiff's ambitious project has caused classified documents to be prepared about him. At first blush, the investigation appears ludicrous. However, a review of the facts suggests that the rate of plaintiff's correspondence and plaintiff's use of return envelopes marked "Laboratory Disposable Products" could be expected to prompt the FBI to collect information about the correspondence using properly

classified intelligence sources and methods. This fact, taken in conjunction with the Court's in camera inspection of the withheld documents, necessitates a finding, upon de novo review, that the FBI properly withheld material pursuant to Exemption One of FOIA. Therefore, the Court will grant summary judgment dismissing plaintiff's FOIA claim.

2. Exemption 7 - Investigatory Records and Invasion of Privacy

Because the Court finds that the FBI has properly withheld requested documents under Exemption One to FOIA, the Court need not consider at length the FBI's attempt to withhold names of FBI agents and employees who worked on the Patterson case through invocation of §552(b)(7)(C),

which exempts from disclosure:

> (7) investigatory records compiled for law enforcement purposes but only to the extent that the production of such records would...(C) constitute an unwarranted invasion of personal privacy....

The Court finds that the relevant caselaw supports the view that Exemption 7(C) of FOIA can apply to the invasion of privacy of law enforcement personnel, identification of whom "could conceivably subject them to harassment and annoyance in the conduct of their official duties and in their private lives." Nix v. United States, 572 F.2d 998 (3rd Cir. 1978). The possibility of invasion of the privacy of law enforcement personnel must be balanced "against the public benefit

that would result from disclosure." Lane v. U.S. Dept. of Justice, 654 F.2d 917, 923 (3d Cir. 1981).

In the case at hand, the public benefit that would result from releasing the names of FBI personnel involved in the investigation of Todd Patterson is negligible, particularly in view of the Court's finding that the FBI engaged in no illegal conduct in regard to its investigation of plaintiff. Therefore, the FBI properly invoked Exemption Seven to justify the withholding of the names of FBI personnel in response to plaintiff's FOIA request.

B. Plaintiff's Privacy Act Claim

The Privacy Act, 5 U.S.C. §552(a) (1982), like the Freedom of Information

Act, "demonstrates a congressional desire to foster open government and accessibility to government records." Vymetalik v. F.B.I., 785 F.2d 1090, 1092 (D.C. Cir. 1986). The Privacy Act is primarily designed to make government agencies more accountable regarding the gathering, disseminating and accuracy of records maintained in government files about individuals. The Act limits the discretion of agencies to collect and maintain information about individuals and requires that government records by maintained "with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual[.]" Greentree v. U.S.

Customs Service, 674 F.2d 74, 76 (D.C. Cir. 1982) (discussing the purposes and history of the Privacy Act.

In his second cause of action, plaintiff relies on §552a(e)(7), which provides:

> (e) Agency requirements. - Each agency that maintains a system of records shall-
> (7) maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

An individual can enforce a violation of §552a(e)(7) by bringing a civil suit pursuant to §552a(g)(1).21

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21. (g)(1) Civil Remedies. - Whenever any agency

As a preliminary matter, the FBI

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the

claims to have exempted its central records system from the civil remedy provision of the Privacy Act through promulgation of 28 C.F.R. §16.96. However, that rule exempts the central records system "only to the extent that information in this system is subject to exemption pursuant to 5 U.S.C. [§] 552[a](j) and (k)." Section 552(j)(2), in

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agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

(2)(A) In any suit brought under the provisions of subsection (g)(1)(A) of this section, the court may order the agency to amend the individual's record in accordance with his request or in such other ways as the court may direct. In such a case the court shall determine the matter de novo.

turn, allows an agency to exempt records only to the extent they were compiled for purposes of a criminal investigation.[22]

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22. Section 552(j) provides:

> (j) General exemptions. - The head of any agency may promulgate rules, in accordance with the requirements (including general notice) of sections 553(b)(1), (2), and (3), (c), and (e) of this title, to exempt any system of records within the agency from any part of this section except subsections (b), (c)(1) and (2), (e(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i) if the system of records is-
>
> > (1) maintained by the Central Intelligence Agency; or
> >
> > (2) maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals, and the activities of

The FBI cannot claim that all of its

> prosecutors, courts, correctional, probation, pardon, or parole authorities, and which consists of
>
> (A) information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;
>
> (B) information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or
>
> (C) reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or

records must necessarily be considered as compiled for purposes of criminal investigation merely by virtue of the function that the FBI serves. Vymetalik, 785 F.2d 1090, 1095; Pratt v. Webster, 673 F.2d 408, 415 n. 14 (D.C. Cir. 1982). Instead, the FBI must adequately demonstrate that its records on plaintiff were compiled specifically for purposes of a criminal investigation. In the case at bar, the FBI has not made such a showing.

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indictment through release from supervision.

As shown by the above language, §552(j)(2) also allows an agency to exempt records related to identifying criminal offenders or compiling reports about individuals after indictment or arrest. However, only category (B) information related to a criminal investigation is pertinent here.

Because of this, the FBI cannot properly contend that the plaintiff's Privacy Act claim is barred by the FBI's regulation exempting the FBI's central records system from the civil remedy provision of the Privacy Act.

However, even if the FBI has not satisfied the §552a(j)(2) standard of a "criminal investigation", the FBI would still be entitled to summary judgment on plaintiff's Privacy Act claim if it could show that records the FBI maintained on plaintiff's exercise of First Amendment rights were "pertinent to and within the scope of an authorized law enforcement activity," under the dictates of §552a(e)(7). Indeed, interpretation of the Privacy Act suggests that it would be

easier for the FBI to satisfy the "law enforcement activity" standard of §552a(e)(7) rather than the "criminal investigation" standard of §552a(j)(2). Thus, the Court will focus on whether the FBI has demonstrated that the records maintained on plaintiff were pertinent to an authorized law enforcement activity of the FBI.

The precise meaning of "pertinent to and within the scope of an authorized law enforcement activity" is not provided by the statute itself. The statute's definitions do not include the term "law enforcement activities," and the phrase does not appear anywhere else in the statute. However, interpretation of the

phrase must be viewed in light of Congress's intention for Section (e)(7) of the Privacy Act to restrict the information about individuals' First Amendment activities that the government may collect and maintain and to prevent "collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that government or the particular agency might possibly have to deal with them in the future." S. Rep. 1183, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 6916, 6971.

Thus, the relatively few circuit courts which have interpreted Section (e)(7) have all found that the law

enforcement activity exception must be read narrowly and that the agency involved must make an affirmative showing that the records maintained on First Amendment activities were in some way related to law enforcement objectives, although the courts have differed somewhat on the exact standard warranted. See MacPherson v. I.R.S., 803 F.2d 479 (9th Cir. 1986) (individual, case-by-case analysis of whether agency's actions were pertinent to authorized law enforcement activity); Jabara v. Webster, 691 F.2d 272, 279 (6th Cir. 1982) (Section (e)(7) "allows investigation with respect to the exercise of First Amendment rights if such investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one."), cert. denied, 464 U.S. 863, 104 S. Ct. 193

(1983); Clarkson v. I.R.S., 678 F.2d 1368, 1375 (11th Cir. 1982) (Section (e)(7) is violated "to the extent that the [agency] has engaged in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violations of the statutes which it is authorized to enforce..."), cert. denied, 481 U.S. 1031, 107 S. Ct. 1961 (1987). See also Nagel v. U.S. Dept. of Health, Education and Welfare, 725 F.2d 1438, 1441 n. 3 (D.C. Cir. 1984) (adopting Jabara standard).[23]

This Court finds that the legislative purpose of §552(e)(7) is best effectuated by requiring agencies to demonstrate that any and all records maintained on an

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23. The Third Circuit has not yet considered the question faced here.

individuals's exercise of First Amendment rights are relevant to an authorized law enforcement activity of the agency, and that there exists a sufficient basis for the maintenance of such records.[24] Moreover, the Court recognizes that any question of relevance must be linked with consideration of the facts of a particular case. See MacPherson v. I.R.S., 803 F.2d at 484.

Turning to the facts of the case at hand, the Court found on its initial review that the FBI had not adequately demonstrated that its activities directed at plaintiff's exercise of First Amendment

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24. All cases considering Section (e)(7) have concluded that even after the pertinent law enforcement activity has been completed, the agency can continue to maintain the related records.

rights were relevant to an authorized law enforcement activity. All defendant submitted in this regard was a five line paragraph citing to the Espionage Statute and the Foreign Agents Registration Act, without any reference to facts in some way linking the plaintiff's First Amendment activities with enforcement of those statutes.[25]

While the FBI need not make a showing

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25. The FBI's paragraph on authorization states:

IV. JUSTIFICATION FOR FBI'S INVESTIGATION

(L) A foreign counterintelligence investigation was conducted by the FBI. The authority for this type of investigation includes such statutes as Title 18, U.S.C., Sections 792-798 (Espionage) and Title 22, U.S.C., Section 611-621 (Foreign Agents Registration Act.) Lieberman Affidavit, ¶10.

that probable cause or reasonable suspicion may have existed about plaintiff, the agency must furnish facts which at least demonstrate that the records maintained on plaintiff's exercise of First Amendment rights, such as letterwriting, were relevant to a legitimate, authorized law enforcement objective. Reference to statutes, without any underlying factual basis, cannot suffice given the intent of Congress to curtail the extent of records government agencies may maintain on individuals' exercise of First Amendment rights. As one court has stated:

> The mere compilation by the government of records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise.

Nagel, 725 F.2d at 1441.

Because the FBI had not made an adequate showing of the relevance of records maintained on plaintiff's exercise of First Amendment rights to an authorized law enforcement activity, the Court ordered the FBI to submit an in camera affidavit which would further attempt to demonstrate the required relevance. The FBI subsequently submitted the Greer Affidavit to serve this purpose. Upon review of the Greer Affidavit, the Court now finds that records maintained by the FBI on plaintiff's exercise of First Amendment Rights are relevant to an authorized law enforcement activity of the FBI and that the continued maintenance of such records does not violate any provision of the Privacy Act.

In retrospect, it is clear that plaintiff violated no laws in the course

of his correspondence project nor was involved in any clandestine activity, yet the FBI could not have known this prior to undertaking some type of investigation. Such an investigation, and any related records kept, would be justified as long as the FBI complied with the relevant statutes and undertook the investigation in the least intrusive means possible given the circumstances. The Court finds the FBI's investigation and maintainance of records on plaintiff does fit within statutory and regulatory limits. This finding may be of only limited consolation to plaintiff, whose legitimate exercise of First Amendment rights resulted in an FBI file. However, plaintiff can take satisfaction in the fact that his resort to the judicial process has resulted in this Court conducting an independent

examination of the FBI's conduct in accordance with the statutory standard as set out by Congress in the Privacy Act. In the Privacy Act, Congress implicitly accepted that the slight chill on free speech created by Agency maintenance of records on First Amendment activity is necessary in light of the need for Agencies to maintain adequate records relevant to legitimate law enforcement activities. After reviewing the Greer Affidavit, the Court finds that the FBI has acted properly in regard to records maintained about plaintiff. However, the in camera inspection also allows this Court to assure plaintiff that any records maintained by the FBI on him do not reflect negatively on his character or conduct. Accordingly, the Court can assure plaintiff that the law enforcement

activity conducted by the FBI in this case should not in any way inhibit him from pursuing any legitimate exercise of his First Amendment rights, including writing letters to countries throughout the world. Furthermore, plaintiff's fear of an aborted or limited public service career arising out of these events is misplaced.

Therefore, the Court will grant the FBI's motion for summary judgment, dismissing the Privacy Act claim of plaintiff's complaint.

C. Plaintiff's Cause of Action Based on Violations of the First and Fourth Amendments and 18 U.S.C. §1702 and 19 U.S.C. §482.

Apart from his FOIA and Privacy Act causes of action, plaintiff alleges that defendant violated his First and Fourth Amendment rights, as well as the provisions of 18 U.S.C. §1702,[26] and 19

U.S.C. §482.[27]

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26. 18 U.S.C. §1702 provides:

> Obstruction of correspondence
> Whoever takes any letter, postal car, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

27. 19 U.S.C. §482 provides:

> Search of vehicles and persons
> Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect

1. First Amendment Claim

An individual alleging direct violation of the Constitution may bring

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there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

suit against federal officials for damages and equitable relief. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999 (1971). Plaintiff in this case has named John Doe, an unknown employee of the United States government as a defendant. A Bivens suit[28] is available to remedy violation of a number of Constitutional provisions, including the First Amendment.[29] See e.g. Ogden v. United

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28. Plaintiff's claim is not technically a Bivens action, since plaintiff seeks no monetary damages. See Paton v. LaPrade, 524 F.2d 862, 869 (3d Cir. 1975). However, legal analysis is essentially the same as for a standard Bivens action.

29. The Court notes that to the extent plaintiff's First Amendment claim involves damages as a result of the FBI's maintenance of records on plaintiff, such an acion is apt to be foreclosed by the existence of the Privacy Act. This is in

States, 758 F.2d 1168 (7th Cir. 1985); Angola v. Civiletti, 666 F.2d 1 (2d Cir. 1981); Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975).

The touchstone of a Bivens suit must be some illegal or inappropriate conduct on the part of a federal official which results in a Constitutional violation. Paton, 524 F.2d. After reviewing the record as a whole, including in camera inspection of the withheld documents and the Greer Affidavit, the Court finds, as a matter of fact, that the FBI and any FBI or other government employees involved in activities concerning plaintiff acted in

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keeping with the principle that a Bivens action is foreclosed if Congress provides an alternative, adequate remedy. Bush v. Lucas, 462 U.S. 378, 103 S. Ct. 2404 (1983).

accord with all applicable statutory and regulatory guidelines. Beyond finding compliance with the relevant statutes and regulatory guidelines, the Court finds that regulations which authorized the activities undertaken by defendant in this case did not impermissably chill plaintiff's First Amendment right of free speech, and represent a lawful exercise of the federal government's responsibility for conduct of foreign policy and national security affairs with negligible First Amendment implications. See United States v. Robel, 389 U.S. 258, 267-68, 88 S. Ct. 419, 425 (1967) ("We have recongized that, while the Constitution protects against invasions of individual rights, it does

not withdraw from the government the power to safeguard its vital interests....Faced with a clear conflict between a federal statute enacted in the interests of national security and an individual's exercise of his First Amendment rights, we have confined our analysis to whether Congress has adopted a constitutional means in achieving its concededly legitimate legislative goal."). In the current case, there is in fact no direct conflict between plaintiff's First Amendment rights and the relevant statutory provisions and administrative regulations as applied. Moreover, any limitations on plaintiff's First Amendment freedoms are minimal and appropriate considering the important foreign policy and national security objectives involved.

Therefore, plaintiff's claim for

injunctive relief based on the government's violation of the First Amendment rights must be denied and summary judgment entered in favor of defendants.

2. Fourth Amendment Claim

Plaintiff asserts that defendants violated his Fourth Amendment rights through the unlawful opening of his mail. However, as with plaintiff's First Amendment claim, the Court finds after reviewing the record and the in camera submissions of defendant, that the FBI conducted no illegal searches involving plaintiff and acted in accordance with all relevant statutory and administrative guidelines.

Plaintiff argues that even if the present record does not support a claim of Fourth Amendment violation, summary

judgment is foreclosed because of the failure of the FBI to respond adequately to plaintiff's discovery requests. However, this argument must fail in light of the Court's finding that the FBI has properly invoked the military and state secrets privilege. The standard for evaluating a claim of the state secrets privilege was set forth at length by the District of Columbia Circuit in Ellsberg v. Mitchell, 709 F.2d 51 (D.C. Cir. 1983), cert. denied sub nom., Russo v. Mitchell, 465 U.S 1038, 104 S. Ct. 1316 (1984); cert. denied sub nom., Russo v. Mitchell, ____ U.S. ____, 108 S. Ct. 197 (1987). The D.C. Circuit stated:

> Although there can be no abdication of a judicial role in connection with proposed applications of the state secrets doctrine, it is nevertheless frequently noted that the trial judge should accord considerable deference to recommendations from the executive

> department. Moreover, it is recognized that the government need not demonstrate that injury to the national interest will inevitably result from disclosure; a showing of 'reasonable danger' that harm will ensue is sufficient. Finally, when assessing claims of a state secrets privilege, a trial judge properly may rely on affidavits and other secondary sources more often than he might when evaluating assertions of other evidentiary privileges.

Id. at 59 (citations omitted).

In the case at bar, the Court finds a "reasonable danger" that harm to the national interest will ensue if defendant's are forced to comply with plaintiff's discovery requests. Therefore, the FBI's proper assertion of the state secrets privilege taken in conjunction with the Court's determination that the present record contains no evidence supporting a finding of illegal conduct on the part of the FBI, necessitates the Court granting

defendant's summary judgment dismissing plaintiff's Fourth Amendment claim.

3. Plaintiff's Statutory Claims

The plaintiff's claims based on alleged violations of 18 U.S.C. §1702 and 19 U.S.C. §482 are in large part identical to the plaintiff's First and Fourth Amendment claims considered above. To succeed on a claim based on either statute, plaintiff would need to present evidence of an illegal interference with his mail. However, the Court finds, after considering the in camera submissions of defendant, that there is no evidence which would support a finding of illegal tampering or interference with plaintiff's mail. Furthermore, the FBI's proper invocation of the state secrets privilege forecloses plaintiff from claiming inadequate response to his discovery

requests.

Therefore, the Court must grant summary judgment dismissing plaintiff's claims brought under 18 U.S.C. §1702 and 19 U.S.C. §482.

D. The FBI's Offer to Expunge Plaintiff's Name From Its Files

In its supporting papers and again at oral argument, the FBI offered to expunge the name of Todd Patterson from its records. This offer strikes the Court as a fair and practical resolution of this litigation. It enables the FBI to safeguard information concerned with sources and methods of counter-intelligence while at the same time it eliminates any potential damage to plaintiff which he envisions the FBI's past activities may cause him in the future. However, because the Court has

found that the FBI engaged in no illegal or overly intrusive conduct, it would be inappropriate for this Court to now order the FBI to expunge plaintiff's name from its files. See Paton v. LaPrade, 524 F.2d at 868-69. Nonetheless, the Court invites the FBI to abide by its offer to expunge plaintiff's name, as the Court believes it to be the type of good faith gesture that will help defuse the sense of outrage that precipitated this proceeding.

III. CONCLUSION

For the reasons set forth above, the Court grants defendant FBI's motion for summary judgment dismissing the first, second and third causes of action of plaintiff's complaint, and the Court will order that judgment be entered in favor of all defendants, real and fictitious, named in plaintiff's action.

An appropriate order shall be submitted by counsel for defendant.

Dated: February 7, 1989

ALFRED M. WOLIN, U.S.D.J.

United States District Court

District of New Jersey

Chambers of
Alfred M. Wolin
Judge

USPO & Courthouse
Bldg.
Newark, NJ 07101

APPENDIX A

December 30, 1988

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Frank Askin, Esq.
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Newark, New Jersey 07102

Re: Todd Patterson v. Federal Bureau of Investigation, et al.
Civil Action No. 88-2319

Dear Counsel:

Currently before the Court is the FBI's motion for summary judgment directed against the claims of plaintiff Todd Patterson. At the close of oral argument, I indicated that an opinion on the motion would be issued within a week. However, because certain issues were raised in oral argument that were not adequately addressed in the supporting papers, I have concluded that in camera inspection of certain withheld documents is required in order for this Court to assure itself that the FBI has acted in good faith with regard to its investigation of Todd Patterson, that the FBI complied with all relevant government regulations, and that the FBI engaged in no illegal conduct.

Therefore, I am ordering the FBI to turn over to the Court, for in camera

inspection, the document listed as Document No. 4 in Exhibit B of the FBI's Notice of Motion, the one-page FBI airtel dated January 6, 1984, along with the 17 additional pages attached. I am also ordering the FBI to submit for in camera inspection the document listed as Document No. 5 in Exhibit B of the FBI's Notice of Motion, the one-page FBI airtel dated December 5, 1985, along with the five additional pages attached. The documents and the attached pages should be submitted to the Court in complete and unredacted form.

While I do not resort to in camera inspection lightly, I believe in this case that in camera inspection of the specified documents is the best means available to render substantial justice to plaintiff's claims, yet also insure that any

legitimate intelligence activities, sources or methods of the government remain protected against public disclosure.

After reviewing the specified documents in camera, as well as the affidavit ordered by the Court at oral argument, I will then issue a formal opinion addressing the FBI's summary judgment motion in its entirely.

Very truly yours,

ALFRED M. WOLIN

U.S.D.J.

AMW:bv

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TODD PATTERSON, etc., Plaintiff,	:	Civil Action No. 88-2319
v.	:	
FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	:	O R D E R

In conformity with this Court's letter to counsel dated December 30, 1988,

It is on this 30th day of December, 1988,

ORDERED that defendant FBI turn over to the Court, for in camera inspection, the document listed as Document No. 4 in Exhibit B of the FBI's Notice of Motion, the one-page FBI airtel dated January 6, 1984, along with the 17 additional pages attached, and it is further

ORDERED that defendant FBI submit for in camera inspection the document listed as Document No. 5 in Exhibit B of the

FBI's Notice of Motion, the one-page FBI airtel dated December 5, 1985, along with the five additional pages attached, and it is further

ORDERED that the specified documents and attached pages should be submitted to the Court in complete and unredacted form within 21 days of the date of this order.

ALFRED M. WOLIN, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TODD PATTERSON, etc., Plaintiff,	:	Civil Action No. 88-2319
v.	:	
FEDERAL BUREAU OF INVESTIGATION, et al., Defendants.	:	O P I N I O N and O R D E R

Currently before the Court is the motion of plaintiff, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, to vacate this Court's entry of summary judgment or, in the alternative, to supplement the record. Plaintiff contends that new evidence disclosed by defendant Federal Bureau of Investigation in response to two Freedom of Information Act ("FOIA") requests made by plaintiff on September 7, 1988 and November 6, 1988 to the Newark and New York F.B.I. field offices is material to the Privacy Act, 5

U.S.C. § 552a et seq., cause of action included in plaintiff's Complaint.

I. BACKGROUND AND DISCUSSION

For a detailed discussion of the factual and procedural background of this case, the parties are referred to the February 7, 1989 Opinion of the Court. In that Opinion, the Court granted summary judgment in favor of defendants on all three causes of action in plaintiff's complaint. Subsequently on March 15, 1989, plaintiff received the F.B.I.'s response to his two Fall 1988 FOIA requests. One item disclosed was a May 24, 1988 newspaper article describing plaintiff's bringing of a suit against the F.B.I. It is the presence of this newspaper article in the F.B.I.'s records that apparently motivated this Rule 60(b) motion. On March 30, 1989, plaintiff's

motion for reconsideration of the Court's February 7, 1989 Opinion was denied. On April 25, 1989, plaintiff filed a notice of appeal to the Third Circuit. Ordinarily, a notice of appeal divests the district court of all jurisdiction in a case. However, a district court does have the power to both entertain and deny a Rule 60(b) motion even while an appeal is pending. Venen v. Sweet, 758 F.2d 117 (3d. Cir. 1985).

Plaintiff's contention that the materials disclosed by plaintiff's additional FOIA requests entitle plaintiff to Rule 60(b) relief demonstrates a misunderstanding of the procedural — requirements for an action based on the Privacy Act and of the procedural history of this case. 5 U.S.C. § 552a(d)(2)-(3) lays out the Privacy Act's procedural

requirements for a party to request amendment of an agency's records. For example, if plaintiff objected to the newspaper article being contained in the F.B.I. file, plaintiff could have requested the F.B.I. to delete the newspaper article, and if such request was denied, plaintiff could then have sought judicial review. 5 U.S.C. § 552a(g)(1)(A). Thus, the documents disclosed pursuant to plaintiff's September 7, 1988 and November 6, 1988 FOIA requests do not constitute new evidence for purposes of this action but instead entitled plaintiff to seek administrative redress, and, if necessary, judicial review.

Plaintiff also cannot successfully maintain that his Fall 1988 FOIA requests are somehow under the purview of this

lawsuit. This action grew out of plaintiff's 1987 FOIA request to the F.B.I.'s Washington, D.C. office. Defendant consented, however, to let this suit also cover plaintiff's March, 1988 FOIA request to the F.B.I.'s Newark field office. These are the only FOIA requests of plaintiff that are properly before this Court. Obviously, a May 24, 1988 newspaper article would not be in plaintiff's F.B.I. file at the time of plaintiff's March, 1988 FOIA request. The newspaper article is new material that was released pursuant to additional FOIA requests of plaintiff and cannot be considered new evidence for purposes of this action.

Accordingly,

It is on this 16th day of August, 1989,

ORDERED that plaintiff's motion pursuant to Fed. R. Civ. P. 60(b) is denied.

Alfred M. Wolin, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, etc.	:	
Plaintiff,	:	Civil Action No. 88-2319
v.	:	
FEDERAL BUREAU OF INVESTIGATION, et al.,	:	OPINION and ORDER
Defendants	:	

This matter comes before the Court upon the motion of plaintiff, Todd Patterson, by his attorney, Frank Askin, Esq., for reconsideration of this Court's Order of February 27, 1989, which granted summary judgment in favor of all named defendants.

Plaintiff contends that the Court erred in its decision granting summary judgment because the Court improperly relied on the in camera submissions of defendant. Plaintiff's position runs

counter to the relevant statutes and caselaw; therefore, plaintiff's motion must be denied.

The Freedom of Information Act, 5 U.S.C. § 552 ("FOIA"), specifically provides for the Court's use of and reliance upon in camera submissions. 5 U.S.C. § 552 (a)(4)(B). Moreover, courts have continually held that in camera submissions may be relied upon in cases involving FOIA, the Privacy Act (5 U.S.C. § 552 et seq.), or government use of the military and state secrets privilege. See Salisbury v. United States, 690 F.2d 966 (D.C. Cir. 1982) (in camera submissions relied upon in a case involving FOIA and invocation of military and state secrets privilege); Weberman v. National Security Agency, 668 F.2d 676, 678 (2d Cir. 1982) (In FOIA case involving in camera review

of agency affidavit, the Court stated: "Disclosure of the details of this affidavit might result in serious consequences to the nation's security operations. The risk presented by participation of counsel, Hayden v. NSA, 608 F.2d 1381, 1385-86 (D.C. Cir. 1979), outweighs the utility of counsel, or adversary process, in construing a supplement to the record."); Stein v. Department of Justice & FBI, 662 F.2d 1245 (7th Cir. 1981) (Use of in camera affidavit approved in case involving FOIA and Privacy Act claims.).

As plaintiff's sole ground for his motion for reconsideration is without an adequate basis in law, the motion must be denied.

Therefore, it is on this 30th day of March, 1989,

ORDERED, that plaintiff's motion for reconsideration is hereby denied.

Alfred M. Wolin, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 89-5342 and 89-5781

Todd Patterson, et al.

Appellant

vs.

Federal Bureau of Investigation, etc.

SUR PETITION FOR REHEARING

Present: HIGGINBOTHAM, Chief Judge, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, and NYGAARD, Circuit Judges, and GAWTHROP, District Judge*

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in

regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

_____

Circuit Judge

Dated: February 7, 1990

* District Judge Gawthrop voted only as to panel rehearing.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON,	]U.S.C.A.]#89-5342 and]#89-5781](Consolidated)
Appellant,	]
v.	]
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government,	]
Appellees.	]

On Appeal from the United States District Court for the District of New Jersey

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PETITION FOR REHEARING AND REHEARING IN BANC

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Attorney for Todd Patterson on behalf of the American Civil Liberties Union of New Jersey

Student Intern on the brief:
Adam Todd

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PETITION FOR REHEARING

Plaintiff petitions the Court, pursuant to Rule 40 of the Federal Rules of Appellate Practice, for a rehearing and a rehearing in banc on his appeal in the cases numbered 89-5342 and 89-5781. A Judgment was entered and an Opinion was filed in both of these cases by this Court on January 8, 1990.

It is respectfully suggested that the panel opinion is inconsistent with this Court's previous opinion in Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) and decided important legal issues on the basis of an erroneous understanding of their factual underpinnings and legal consequences. This is not surprising considering the novelty as well as the complex nature of the issues involved; the balancing of national security

interests and First Amendment rights, as was presented in this case, is one of the most difficult tasks faced by any court. Petitioners understand that rehearing in banc is not favored and ordinarily will not be ordered, however, considering the questions of exceptional importance raised in this case, we ask this Court to grant a rehearing pursuant to Federal Rules of Appellate Procedure 35 and 40.

As counsel, I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to a prior decision of the United States Court of Appeals for the Third Circuit, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court, to-wit, the panel's decision is contrary to the decision of this Court in the case Paton v. LaPrade, 524 F.2d 862

(1975). Furthermore, this appeal involves the following questions of exceptional importance, to-wit:

A. Whether the Privacy Act requires that the term "pertinent to and within the scope of" in Section (e)(7) of the Privacy Act be read as requiring more than mere "relevance".

B. Whether the Court may decide disputed issues of material fact on the basis of in camera, ex parte testimony in the face contrary to fundamental notions of American jurisprudence and the adversarial system.

***

I. THE PANEL'S OPINION IS INCONSISTENT WITH THIS COURT'S OPINION IN PATON V. LAPRADE, 524 F.2d 862 (3d Cir. 1975).

The failure of the panel opinion to even acknowledge this Court's opinion 15 years ago in Paton v. LaPrade, 524 F.2d 862 (3d Cir. 1975) is mystifying.

Even prior to adoption of the Federal Privacy Act, Paton v. LaPrade, recognized a right to relief of a plaintiff under very similar circumstances. Responding to a claim that the F.B.I. was maintaining information concerning the First Amendment activities of a teenager after intercepting her letter to a domestic political organization as a result of a mail cover, the court held the plaintiff was entitled to seek judicial expungement of her file directly under the First Amendment. The court held that the existence of such a file threatened

palpable harm to plaintiff. 524 F.2d at 868. On remand, the District Court provided such relief. Paton v. LaPrade, 469 F.Supp 773 (D.N.J., 1978) and 471 F.Supp. 166 (D.N.J. 1979).

Inexplicably, the panel determined that Todd Patterson, now armed with the additional weapon of Section (e)(7) of the Privacy Act, providing an explicit remedy for the improper maintenance of First Amendment information, has no right to similar relief.

As the subsequent section will reveal, the panel opinion is not only inconsistent with this Court's opinion in Paton v. LaPrade, but misconceives the meaning and intent of Section (e)(7).

II. THE INTERPRETATION GIVEN BY THE PANEL OPINION TO 5 U.S.C. 552a(e)(7) EFFECTIVELY GUTS THAT PROVISION AND NULLIFIES THE INTENT OF CONGRESS, INADOPTING THE PRIVACY ACT, TO PUT AN END

TO THE PRACTICE OF THE FBI AND OTHER FEDERAL AGENCIES OF MAINTAINING INFORMATION ON INDIVIDUALS DESCRIBING THEIR EXERCISE OF RIGHTS PROTECTED BY THE FIRST AMENDMENT IN THE ABSENCE OF SUBSTANTIAL NEED.

The panel opinion betrays its misinterpretation of the Federal Privacy Act, 5 U.S.C. 552a, in the very first sentence when it asserts that Todd Patterson "caused himself to be the subject of an investigation by the Federal Bureau of Investigation." Opinion[1] at 2. Todd Patterson no more caused his own investigation than did the millions of Americans upon whom J.Edgar Hoover's F.B.I. compiled the dossiers which led Congress in 1974 to adopt Section (e)(7) of the Privacy Act to prohibit such

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1. All references to the panel's opinion of January 8, 1989, shall hereinafter be refered to as "Opinion at ___."

practices. The purpose of Section (e)(7) is to prevent "collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future." S.Rep. 1183, 93d Cong. Sess., reprinted in 1974 U.S. Code & Admin News 6916, 6971;[2] see also Ehlke, The

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[2]. The legislative history quoted by the appeals panel on page 15 of the opinion suggests a misreading of the legislative history of the Privacy Act and the interpretation of Section (e)(7). The quote taken from page 6960 of 1974 U.S. Code Cong. & Admin. News 6916, is referring only to general information compiled by an agency, not information concerning First Amendment activities. If the panel had continued reading in the same legislative history that they cite, they would have read that records concerning First Amendment activities requires agencies to apply a higher level of scrutiny. See 1974 U.S. Code and Cong. & Admin. News 6916, at 6971. Even so, the panel opinion emphasizes the word "relevance" in the citation and ignores the words that follow: "and necessary."

Privacy Act After a Decade, 18 J. Marshall L. Rev. 829 (1985).

The only thing Todd Patterson did was exercise his curiosity about foreign lands and write their governments for information, a pristine exercise of rights protected by the First Amendment to the Constitution of the United States. These are the rights which Section (e)(7) declares are not to be "describe[d]" in F.B.I. files except when they are "pertinent to and within the scope of an authorized law enforcement activity."

The panel interpreted "pertinent to and within the scope of an authorized law enforcement activity" as to mean merely "relevant to a law enforcement activity." By interpreting "pertinent to and within

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Opinion at 15.

the scope of" to mean merely "relevant to", Opinion at 15-16, it applied no stricter a standard to the collection and maintenance of records describing activity protected by the First Amendment than was already applicable, as a threshold matter, to records of every kind kept by federal agencies. This difference in standards that agencies are to apply to general information as opposed to information concerning an individual's First Amendment activities was noted by the Office of Management and Budget in its guidelines:

> Whereas subsection (e)(1) generally enjoins agencies from collecting information not "relevant and necessary" to accomplish a purpose of the agency, [subsection (e)(7)]

establishes an even more rigorous standard governing the maintenance of records regarding the exercise of First Amendment rights.

OMB Guidelines, 40 Fed. Reg. 28960, 28965 (July 9, 1975)(emphasis added).

The panel illustrates its misapprehension of the purpose of the Privacy Act and the nature of plaintiff's (e)(7) claim in a number of points in its opinion. Footnote 10 in the Opinion and its accompanying text states that after having reviewed the documents and the Greer affidavit, it found nothing derogatory in the files regarding Todd or any member of his family. Opinion 11. This statement ignores the derogatory effect the files have in and of themselves. As one case put it:

> We recognize that even "incidental" surveillance and recording of innocent people exercising their

> First Amendment rights may have a chilling effect on those rights that section(e)(7) was intended to prohibit.
> "The mere compilation by the government of those records describing the exercise of First Amendment freedoms creates the possibility that those records will be used to the speaker's detriment, and hence has a chilling effect on such exercise." Nagel v. United States Department of Health Education and Welfare, 725 F.2d 1438, 1441 (D.C.Cir. 1984).

McPherson v. I.R.S., 803 F.2d 479, 483-84 (9th Cir. 1986); see also Paton v. LaPrade, 524 F.2d at 868. Thus, the panel's misapprehension of the derogatory effect of these files illustrates the need for a rehearing.

The panel opinion also errs on page 3 when it states: "Significantly, Todd enclosed much of his correspondence in envelopes bearing the return address of Laboratory Disposable Products, a business Todd's parents operated from their home." However, the record suggests only that

Todd sent his initial mailing, back in 1983, with this "suspicious" return address. Subsequent mailings were written with an "innocent" return address bearing Todd's home address, see Transcript of District Court Proceedings, dated 12-15-89, at 30-31 (Appeals Appendix at 289-90); Plaintiff's Brief for Appeal from Order Denying 60(b) Motion, dated 10-20-89, at 10-11, thus leaving unanswered the question as to why Todd's later mail bearing this "innocent" return address was still being brought to the attention of the F.B.I.

The second error the panel makes in the cited statement, is the significance it places on the fact that the return address, was in the name of "Laboratory Disposable Products." Since Todd's later mail, even with an "innocent" home return address was still being brought to the

attention of the F.B.I., the nature of the return address appears not to have been determinative as to whether Todd's mail was being monitored in some way. What should have been seen as significant by the panel was that the F.B.I., once having ascertained the innocent nature of Todd's correspondence, then changed the subject heading in its files from "Laboratory Disposable Products" to "Todd Patterson." Opinion at 4.

The fact that the F.B.I. changed the heading of its files from "Laboratory Disposable Products" to "Todd Patterson" is significant because Section (e)(7) of the Privacy Act requires independent justification for the maintenance by an agency of information describing the exercise by an individual of rights protected by the First Amendment to the United States Constitution, even if that

information had been properly gathered. The panel opinion seems to be assuming that since the investigation of Todd Patterson was proper, then, the continued maintenance of the files on him is similarly proper.[3] The "relevancy" standard put forward in the panel's opinion for the justified maintenance of information on an individual's exercise of first amendment rights basically negates any difference between "collection" and "maintenance". If a piece of information

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3. It is important to note that the appeals panel decided the issue as to whether the files maintained on Todd Patterson were relevant to a law enforcement activity by an ex parte, in camera examination of the Geer Affidavit which put forward defendant's reasons as to why the records at issue in this case are "pertinent and within the scope of a law enforcement activity." The plaintiff had no opportunity to challenge the assertions made in this affidavit that was crucial in the panel's decision on this issue. Opinion at 16.

is relevant enough to a law enforcement activity to justify its collection, then this opinion makes it automatically justified for its maintenance into perpetuity. It has been plaintiff's position that even if the intial investigation of Todd was justified, once his identity and purpose were established, the records compiled should have been dropped in the wastebasket.

The panel's interpretation disregards the plain meanings of the terms "collect" and "maintain" and disregards the concerns unique to each action. The absence of an independent requirement for justifying continued maintenance would allow an agency to keep in perpetuity every piece of information collected in the course of

its operations. The spirit and intent of (e)(7) of the Privacy Act requires that such information not be maintained by the investigating agency:

> This section's restraint is aimed particularly at preventing collection of protected information not immediately needed, about law abiding Americans, on the off-chance that Government or the particular agency might possibly have to deal with them in the future.

Senate Report, No. 93-1183 at 6960-61. The case Macpherson reiterated this point when it determined that once the investigating agency had determined that there had been no violation of any law, the agency had a responsibility not to maintain the information gathered on plaintiff's exercise of First Amendment rights. MacPherson, 803 F.2d at 482. The court in that case cited with approval the language of Jabara v. Kelley:

> Merely because [an agency] may act within its authority by

> monitoring the public or private speeches of a person in the course of a legitimate security investigation, does not give it the right to maintain records relating to the contents of these speeches where the investigation does not focus on a past or anticipated specific criminal act. Jabara v.Kelly, 476 F.Supp. 561 (E.D. Mich. 1979)(emphasis in original)(quoted with approval in Clarkson v. IRS, 678 F.2d 1368, 1374 (11th Cir. 1982), vacated and remanded, 691 F.2d 272 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1984).

MacPherson, 803 F.2d at 483. Thus, since the panel applied a faulty standard to its interpretation of the Privacy Act, this Court should grant petitioners request for a rehearing on this issue.

Compounding this error in applying the wrong standard to information collected on an individual's First Amendment activities, the panel applied a lesser standard to the collection and maintenance of records of First Amendment activity than that required for records in

general -- by requiring only that records maintained by an agency be relevant, and not both relevant and necessary, to an authorized law enforcement activity.

The panel opinion appears to have completely ignored the word "necessary" in the Privacy Act, where where it mandates that agencies maintain "only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by executive order of the President." 5 U.S.C. 552a(e)(1) [emphasis added].[4] The relevancy standard upheld by the panel makes the word "necessary" in this act

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4. Note that in the quote on the top of page 15 in the Opinion, the appeals panel only emphasized the word "relevant" and that the word "necessary" appears to be completely ignored.

mere surplusage. However, it is clear that this word was not intended to be repetitive but rather was supposed to create a higher standard for the collection and maintenance of information than mere relevancy. As was noted by the Office of Management and Budget:

> The authority to maintain a system of records does not give the agency the authority to maintain any information which it deems useful. Agencies shall review the nature of the information which they maintain in their systems of records to assure that it is, in fact, "relevant and necessary." Information may not be maintained merely because it is relevant; it must be both relevant and necessary.

OMB Guidelines, 40 Fed. Reg. 28960 (July 9, 1975). This misinterpretation of the Act requires that this Court grant a rehearing en banc on this issue. Furthermore, the complete absence of mention of the more rigorous First Amendment requirements of the Act under

Section (e)(7) makes a rehearing on this issue all the more imperative.

III. THE DETERMINATION BY THE PANEL OPINION THAT A FEDERAL COURT MAY DECIDE DISPUTED ISSUES OF MATERIAL FACT ON THE BASIS OF IN CAMERA, EX PARTE TESTIMONY IS INCONSISTENT WITH FUNDAMENTAL NOTIONS OF AMERICAN JURISPRUDENCE AND THE ADVERSARY SYSTEM.

The notion of adversariness is so central to the American notion of due process that it hardly merits extended discussion. A cogent statement is contained in an article by Justice Alan Handler of the New Jersey Supreme Court:

> An unmentioned premise of our adversary system is that the truth takes sides. Because we do not know which side truth has taken, we let the sides fight it out....The premise of the modern adversary system is that an impartial factfinder, be it jury or judge, will reach the correct determination in weighing the evidence that has been presented to it by the advocates of each adversary party, who are dedicated solely to presenting their client's position in the best possible light. In this

contest, the truth will out. Handler, The Judicial Pursuit of Knowledge: Truth or Justice, 41 Rutgers L. Rev. 1, 4 (1988). Unfortunately, the panel has upheld the thwarting of the adversarial process by allowing the District Court to reach a decision as to disputed facts on the basis of evidence not shared with the losing party.

The District Court granted the government's motion for summary judgment as to all counts of plaintiff's complaint after reviewing in camera an affidavit submitted by the government to justify actions which on their face appeared to violate provisions of the Privacy Act forbidding the F.B.I. from maintaining information describing how any person exercised rights under the First Amendment. 5 U.S.C. 552(a)(e)(7). The court's opinion conceded that the public

record contained genuine issues of material fact which would have normally precluded summary judgment but held that the secret affidavit had satisfied the court that the government's action was justified; i.e. the District Court decided contested issues of fact in favor of the government on the basis of evidence concealed from the losing party. Appeals Appendix at 423 (District Ct. Opinion p.26). The panel upheld this procedure. Opinion at 16.

The reliance of the District Court and the panel on the secret Greer affidavit to rule against plaintiff on contested issues of material fact sharply pose the question of the propriety of courts bound by the due process clause of the United States Constitution resorting to secret "Kafkaesque" procedures, to resolve factual disputes. The panel

asserts that litigation involving alleged issues of "national security" are of a special genre exempt from the normal rules governing federal civil proceedings. In such cases, it permits two arms of the government, the executive and the judicial, to privately confer over secret documents and together dispose of citizens' facially meritorious causes of action.

To the extent that any such doctrine is suggested by the language of the United States Court of Appeals for the District of Columbia in Molerio v. FBI, 749 F.2d 815 (1984), plaintiff asked the panel and urges again on rehearing, that such an un-American principle be rejected.

Moliero also may be distinguished from the instant case in that the plaintiff there had already been accorded "considerable discovery" prior to the

court's in camera review and the entire object of the suit was to establish a fact that was a state secret. See Abourezk v. Reagan, 785 F.2d 1043, 1061 (D.C. Cir. 1986), aff'd 484 U.S. 1 (1987). In the instant case, plaintiff has been denied discovery and raises substantial issues in addition to a right of access to the FBI's files.

Even if not distinguishable on the facts, it is hard to imagine a principle more destructive of constitutional rights than this notion of "secret justice." It abrogates fundamental rights of due process and confrontation of witnesses and denies a deserving litigant "the forum provided under the Constitution for the resolution of disputes...." Fitzgerald v. Penthouse Int'l. Ltd., 776 F.2d 1236, 1242 (4th Cir. 1985). It is, as the majority in In Re United States, 872 F.2d 4472

(D.C.Cir. 1989) conceded, a "draconian" result. 872 F.2d at 477.

Such a procedure is especially pernicious when applied in litigation between a citizen and the government accused of violating that citizen's rights. In the present case, the panel obviously believed that the neutral and impartial judge will adequately protect the rights of the litigant who is denied access to crucial and decisive evidence. But only in totalitarian regimes is a citizen compelled to rely totally upon the largesse of one branch of government in disputes with another. Even the independent federal judiciary in our own country has been held to be too closely identified with the Executive to allow it to abrogate the right of jury trial in suits for violation of constitutional rights. As explained by Justice White in

Duncan v. Louisiana, 391 U.S. 145, 156 (1968):

> Those who wrote our [Federal and state] constitutions knew from history and experience that it was necessary to protect against ... judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action.... [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

While much of theconcern of the Founders over "the biased, compliant or eccentric judge," id., focused on protecting the criminally accused, that concern is equally applicable to cases involving litigation between private citizens and government agents other than the criminal prosecutor. That is especially so in a case such as this one which involves a

suit against the law enforcement arm of government by a citizen suffering injury as a result of its criminal investigative activities. Where the stake of the Government in any single criminal prosecution is quite limited, its stake is quite high where government officials are being actively prosecuted for official wrongdoing.

Where release of sensitive information in litigation would truly jeopardize national interests, the proper procedure is that enacted by Congress in the Classified Information Procedures Act, 18 U.S.C. App. 6(c), which puts the government to a choice in criminal cases of releasing the information or abandoning prosecution. In such a way, the conflict between the right to a fair trial and the government's need to protect national security information can be properly

weighed by the government itself.

Baxter v. Palmigiano, 425 U.S. 308 (1976), presents an appropriate model. It held that a valid assertion of the Fifth Amendment privilege against self-incrimination may subject a civil litigant to appropriate sanctions, such as the drawing of an adverse inference at trial. Similarly, in civil cases such as this, where plaintiff presents a prima facie case of violation of fundamental rights, if the government declines to reveal material evidence, it ought to be required to accept the consequence of an adverse determination of what the concealed information would demonstrate if disclosed. At the very most, the government should be entitled only to remove the evidence from the case. See Ellsberg v. Mitchell, 709 F.2d 51, 65 (D.C. Cir. 1983).[5] Certainly the

government should not be able to keep information pertinent to a case from its adversary but simultaneously use it as a sword to establish a fact upon which it has the burden to produce evidence --- it cannot "have its cake and eat it too."

CONCLUSION

In view of the panel opinion's inconsistency with this Circuit's previous case in Paton v. LaPrade, as well as the panel's misapprehension of the Privacy Act and its use of ex parte, in camera testimony to decide material issues of

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5. As an alternative, plaintiff has previously suggested that counsel for the plaintiff be allowed to review the privileged information in camera under protective order. See United States v. American Tel. & Tel. Co., 567 F.2d 121, 133 (1977)

fact, and considering the importance of the issues involved in this case, plaintiff respectfully urges the Third Circuit to grant a rehearing *in banc*.

Dated: January 18, 1990

Respectfully submitted,

Frank Askin
Attorney for Todd Patterson
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
201/648-5687

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON	:	Civil Action No. 88-2319
Plaintiff,	:	Hon. Alfred M. Wolin
v.	:	
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United State Government,	:	NOTICE OF MOTION PURSUANT TO RULE 60(b) TO VACATE THE JUDGEMENT OR, IN THE ALTERNATIVE TO SUPPLEMENT THE RECORD
Defendants.	:	

TO: SUSAN C. CASSELL, ESQ.
Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102

MADAM:

PLEASE TAKE NOTICE that on May 8, 1989, at 10:00 a.m. or as soon thereafter as counsel may be heard, plaintiff will move before the Court before the Honorable Alfred M. Wolin, J.D.C., at the United

States Court House, Newark, New Jersey, for vacation of the judgment granting of defendants' Motion for Summary Judgment due to newly discovered evidence, or, in the alternative, to supplement the record.

The reason for this motion is that plaintiff has recently discovered that crucial evidence was withheld from plaintiff during the Court's consideration of defendants' Motion for Summary Judgment. Based on this newly discovered evidence plaintiff believes that vacation of the judgment is required pursuant to Fed. R. Civ. P. 60(b). In the alternative, plaintiff requests that the Court order that the record be supplemented to include this newly discovered evidence. Movant relies in support of this motion on the attached memorandum of law and affidavit of Frank Askin, Esq.

Respectfully submitted,

FRANK ASKIN, ESQ.
Constitutional Litigation
Clinic
Rutgers School of Law
15 Washington Street
Newark, New Jersey 07102
Attorney for Plaintiff, TODD
PATTERSON, on behalf of the
American Civil Liberties Union
of New Jersey

This 6th day of April, 1989.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON	:	Civil Action No. 88-2319
Plaintiff,	:	Hon. Alfred M. Wolin
v.	:	
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government,	:	AFFIDAVIT OF FRANK ASKIN, ESQ.
Defendants.	:	

STATE OF NEW JERSEY)
: ss.
COUNTY OF ESSEX)

FRANK ASKIN, of full age, being duly sworn according to law, on oath, says:

1. I am attorney for plaintiff, Todd Patterson, in the above captioned case.

2. The Court ruled on defendants' Motion for Summary Judgment on February

27, 1989, granting summary judgment, in favor of the defendant, on all issues in this case. This ruling constitutes a final judgment.

3. By letter dated March 15, 1989, plaintiff received from Emil P. Moschella, Chief Freedom of Information Privacy Acts Section Records Management Division, U.S. Department of Justice, Federal Bureau of Investigation, additional documents maintained by agencies of the FBI concerning the activities of the plaintiff. Such letter and documents are annexed hereto and numbered A1 through A20.

4. I believe that none of the documents numbered A1 through A20 are duplicates of documents previously released by the FBI. My only slight hesitation in making this assertion as to each and every one of these doucments is

that the extreme redaction makes it difficult to be absolutely certain whether a couple of these documents are slightly altered versions of previously seen documents.

5. These documents were unavailable to the Court at the time it rendered its decision in the above captioned matter, at which time the Court was under the mistaken view that defendant had already supplied all records concerning plaintiff maintained by the FBI, for in camera review. Slip Op. at 14.

FRANK ASKIN, ESQ.
Attorney for Plaintiff, TODD PATTERSON.

Sworn to and subscribed before me this 6th day of April, 1989.

EDWARD LLOYD
Attorney at Law
State of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON,	:	Civil Action 88-2319
Plaintiff,	:	Hon. Alfred M. Wolin
v.	:	
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United Stated Government,	:	NOTICE OF MOTION FOR RECONSIDERATION
Defendants.	:	

TO: SUSAN C. CASSELL
Assistant United State Attorney
970 Broad Street
Newark, New Jersey 07102

MADAM:

PLEASE TAKE NOTICE that on March 27, 1989, plaintiff will apply to this Court before the Honorable Alfred M. Wolin, J.D.C., at the United States Court House,

Newark, New Jersey, for an order pursuant to Rule 12(I) of the General Rules of the United State District Court for the District of New Jersey granting reconsideration of defendants' Motion for Summary Judgement and for rehearing of reargument of such motion.

The reason for this motion is that there are matters and decisions which plaintiff believes the Court has overlooked in ruling on defendants' Motion for Summary Judgement as more fully set forth in the accompanying Memorandum in Support of Plaintiff's Motion for Reconsideration. Attached hereto is a proposed order requiring that the in camera submissions of defendants be released to plaintiff, that plaintiff be granted an opportunity to submit a supplemental affidavit and/or a supplemental brief pursuant to Federal

Rules of Civil Procedure 56(e) and 56(f), and that reargument of defendants' Motion for Summary Judgement be set at a date and time to be determined by the Court.

Respectfully submitted,

FRANK ASKIN
Constitutional Litigation Clinic
Rutgers School of Law
15 Washington Street
Newark, New Jersey 07102
Attorney for Plaintiff, TODD PATTERSON, on behalf of the American Civil Liberties Union of New Jersey

this 28th day of February, 1989.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON,	:Civil :Action :No. :88-2319
Plaintiff,	: :
v.	:Hon. :Alfred
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United State Government, and JOHN DOE AGENCY, an unknown agency of the United States Government,	:M. :Wolin : : : :
Defendants.	:

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION

PLAINTIFF IS ENTITLED TO RECONSIDERATION, REHEARING OR RELIEF FROM JUDGMENT BECAUSE THE GRANT OF SUMMARY JUDGMENT IS BASED ON EVIDENCE IMPROPERLY CONSIDERED.

The Federal Rules of Civil Procedure clearly provide that summary judgment shall be granted based solely on fact admisable in evidence. See Fed. R. Civ. P. 56(e). These facts may be contained in

documents admissible at trial or affidavits of witnesses detailing testimony to be presented at a trial on the merits. "Rule 56(e) requires that both supporting [sic] and opposing affidavits be made on personal knowledge, set forth facts that would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated herein." 6 Moore's Federal Practice, section 56.11[1.-8] at 56-99 (1988) (footnote omitted). Defendants' Motion for Summary Judgment was granted on each count in reliance on an in camera affidavit submitted by defendants. Documents withheld from disclosure under claims of privilege are not admissible as evidence.

The consideration of materials inadmissible in evidence in ruling on a motion for summary judgment has been held

to provide grounds for reversal or vacatur of a grant of summary judgment. In Association for Reduction of Violence v. Hall, 734 F.2d 63, 67 (1st Cir. 1984), the First Circuit Court of Appeals faced the issue of whether it was legitimate for the District Court to have relied on documents which it had previously determined to be privileged and as to which it had denied plaintiff's discovery motion. In ruling that the District Court's grant to summary judgment should be vacated and remanded to the trial court, the First Circuit stated that it was improper to rely on materials, specifically materials determined to be privileged and therefore inadmissible in evidence, that do not fall within the broad category established by Federal Rule of Civil Procedure 56(c). Id. at 67.

Similarly, the Court in Bane v. Spencer, 393 F.2d 108 (1st Cir. 1968),

cert. denied, 400 U.S. 866 (1970), emphatically addressed the inequity of allowing the movant for summary judgment to rely for its motion on materials exclusively within its possession and held exempt from disclosure. In Bane, the defendant, a doctor, incorporated medical records into an affidavit in support of his motion for summary judgment. Thereafter, the defendant successfully moved under state law to impound these medical records, rendering them inaccessible to plaintiff. In remanding the action, the Court of Appeals for the First Circuit recognized that the District Court had found that the records contained nothing of use to the plaintiff. However, the Court of Appeals then went on to state that "the defendant should not be able to use the records as a sword to seek summary judgment and at the same time blind

plaintiff so that he cannot counter. Defendant's affidavit must contain on its face, for plaintiff to see, whatever defendant wishes to rely upon to seek summary judgment." Id. at 109.

The United States District Court for the Southern District of New York extended the ex parte reasoning expressed in Bane to a case involving claims of military and state secret privileges. Kinoy v. Mitchell, 67 F.R.D. 1 (S.D.N.Y. 1975). In Kinoy, plaintiff sought damages for alleged (and subsequently confirmed) wiretapping. The court reserved decision on several pending motions to allow the government to make a formal claim of privilege as to documents plaintiff had subpoenaed and to allow the government to move for summary judgment. 67 F.R.D. at 5. Exhibits were submitted in camera in connection with both a formal claim of

privilege and the motion for summary judgment, a course of action which the district court emphatically rejected:

> Simultaneously, therefore, the Government presents the Court, in camera, with material which it asserts must be withheld from plaintiffs as privileged, yet which it requests the Court to consider in ascertaining material fact and drawing legal conclusions concerning dispositive issues in the case. In this Court's view such a course is wholly unacceptable. Our system of justice does not encompass ex parte determinations on the merits of cases in civil litigation. Either the documents are privileged, and the litigation must continue as best it can without them, or they should be disclosed at least to the parties, in which case the Court will rule after full argument on the merits.

67 F.R.D. at 15 (footnote omitted).

As the court in Kinoy suggested, plaintiff should be allowed access to the Affidavit of Assistant Director of the FBI James H. Greer ("Greer Affidavit") and the

underlying documents on which the FBI relies. In the alternative, the documents should be held formally to be privileged and should be excluded from consideration in ruling on the defendant's Motion for Summary Judgment. Under either circumstance the plaintiff respectfully urges that he be granted a rehearing in order to address the defendant's Motion for Summary Judgment in a fair, equitable and meaningful manner.

CONCLUSION

For the aforementioned reasons, plaintiff respectfully requests that his Motion for Reconsideration be granted.

Respectfully submitted,

Frank Askin
Constutional Litigation Clinic
Rutgers School of Law
15 Washington Street
Newark, New Jersey 07102
Attorney for Plaintiff, TODD

PATTERSON, on behalf of the
American Civil Liberties Union
of New Jersey
this 28th day of February, 1989.

February 16, 1989

Hon. Alfred M. Wolin
United States District Court
USPO & Courthouse Bldg.
Newark, New Jersey 07101

Re: Patterson v. Federal Bureau of Investigation
Civil Action No. 88-2319

Dear Judge Wolin:

This letter is written in response to the Court's letter of February 7, 1989 which requested the submission of changes and corrections to the opinion issued in the above-referenced case.

At the outset, it must be stressed that counsel for the plaintiff is at a distinct disadvantage in attempting to respond to this invitation. Many of the findings made by the Court are based on its in camera inspection of the Affidavit of Assistant Director of the FBI James H.

Greer ("Greer Affidavit"), which was not made available to the plaintiff or his attorney. It is plaintiff's intention to respond to that fact with a separate motion for reconsideration.

Based on the public record, we would like to note the following errors in the opinion:

1. Page 3: The sentence at the top of the page which begins "Significantly" should be changed to reflect that envelopes bearing the return-address "Laboratory Disposable Products" were used by plaintiff in the initial mailing, see Affidavit of Todd Patterson, paragraph 3; however, all subsequent correspondence was mailed in envelopes bearing the return address of Todd Patterson.

2. Page 3: The second sentence of the first full paragraph should be changed to reflect that damaged, opened, and emptied

correspondence received by plaintiff originated from both foreign and domestic sources. See Plaintiff's Statement of Material Facts, paragraph 4. Plaintiff also wishes to make clear for the court that all of the incoming correspondence was addressed to Todd Patterson personally and not to Laboratory Disposable Products. This change should also be reflected in the sentence beginning "Finally," at the bottom of page 5.

3. Page 5: The last sentence of the paragraph beginning at the bottom of the page should be changed to reflect that the FBI only denies wiretapping of the Patterson's home phone by the FBI; however, it does not refute or admit wiretapping of the Laboratory Disposable Products phone line. See Declaration of Vernon Thornton, paragraph 5.

Plaintiff respectfully requests that

the above corrections and changes be incorporated into the final version of the opinion.

Respectfully,

Frank Askin, Esq.
Attorney for Plaintiff

cc: Susan C. Cassell, Esq.
Clerk, USDC for District of New Jersey

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON	:	Civil Action No. 88-2319
Plaintiff,	:	
v.	:	
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government	:	TRANSCRIPT OF HEARING ON MOTIONS
Defendants	:	

Newark, New Jersey
December 15, 1989

BEFORE:
THE HON. ALFRED M. WOLIN, U.S.D.J.

APPEARANCES:
FRANK ASKIN, ESQUIRE,
Attorney for Plaintiff

SUSAN CASSELL, Assistant U.S. Attorney, and

JOHN MARLEY, ESQUIRE, F.B.I. Field Legal Counsel,
Attorneys for Defendants.

Reported by: CHARLES P. McGUIRE, C.S.R.
Official Court Reporter

* * *

Mr. Askin:***

Now, turning to the specifics of the summary judgment motion, and first of all, as Your Honor has indicated, you're interested in Count 1, the Freedom of Information Act count, and on that count, which I agree is separable from the other two but which I think has to be held in a little bit of perspective until we can also get through to the substance of Counts 2 and 3, but on the FOIA count itself, the first count is whether the Vaughn index is adequate, and I would suggest, Your Honor, that up to now, the Vaughn index has not been -- is not sufficient to satisfy the obligations of the F.B.I. to explain what it is and what kind of records they are keeping on Todd and what he has a right to see, and let me focus on two pieces of the Vaughn index.

The very first, and again, it's a little difficult to separate our demand for documents from our demand for information, and of course, our discovery motion is pending, and at one level, our demand for documents may, in fact, be less important than our access to information contained in those documents, so therefore, our discovery motion, really, under Counts 2 and 3 of the complaint, our Privacy Act claims, our constitutional claims, it seems to me entitle us to certain information in those files even if the Court should decide that we are not entitled to some of the documents themselves because of FOIA exemptions under Count 1.

But on the FOIA claim --

THE COURT: Well, how could you get the information if you can't get the document?

MR ASKIN: We've propounded Interrogatories on the Defendants asking them certain questions, factual information contained in their file. They don't have to show us the documents to give us the information. We may be entitled to that information separate and apart from our rights under the Freedom of Information Act. The Freedom of Information Act is separate from the Federal Rules for civil discovery. Even if we did not have a Count 1, if all we had was Counts 2 and 3, we have a right to civil discovery from the Defendants. They cannot at that point invoke FOIA exemptions to say we don't have a right to certain information.

THE COURT: Wouldn't it be foolish for me to say that under the Count 2 Privacy Act, you're entitled to the information, and decline the document

under Count 1?

MR. ASKIN: Oh, absolutely not, Your Honor, because they're two separate questions. FOIA has to do with public access to Government documents, and anybody can make a claim for Government documents; doesn't even have to be somebody who's involved with those documents. If somebody asks for Todd Patterson's files, they'd say, the Government would say, well, we have to protect his privacy, so nobody else can get his files because of his privacy rights. But if we never at all asked for the documents, if all we're doing is suing the Government for violation of Todd's statutory and constitutional rights, we have a right to engage in civil discovery. At that point, the Government may make other objections, they may claim other privileges to certain information or

certain questions, but they cannot invoke the exemptions of FOIA. They're irrelevant to a civil suit for violation of Todd's rights.

So they are separate questions, but on the FOIA claim itself --

THE COURT: How about if they deal with national defense or foreign policy as covered by the Executive Order?

MR ASKIN: Well, there is a military secrets privilege. The Government has a right to assert that. There is a procedure they have to follow, which they have not as yet followed. They indicate that they may be prepared to have the Attorney General file the necessary claim; I'm not sure that that's correct, that there's that implication. Then the Court has to follow through the procedures announced in the Reynolds case about whether or not to allow the claim of what

they call military or state secrets, and at that level, the Court has to, because of the need for the information, the fact that Todd cannot get this information anywhere else, the Court has an obligation to very carefully examine into the validity of the Government's claim of state secrets, whether this is really something --

THE COURT: Haven't they done that in their argument to Count 3?

MR. ASKIN: No, Your Honor, I don't believe so. They indicated they may be prepared for the Attorney General to file that document, first of all, in the procedure. I haven't seen the document; I don't know if they're ready to make that representation in the Court. I assume it is an act of some policy determination for the Attorney General do decide, yes, I am going to file a state secrets privilege

claim in this case. Maybe they will, maybe they won't.

THE COURT: Maybe we should ask Ms. Cassell right now.

Ms. Cassell?

MS. CASSELL: Your Honor, we absolutely are prepared, and the papers are being prepared in Washington now. However, it's our position that we don't need them until Your Honor rules on this motion. If the motion is granted, well, then, we won't need to file it. But the Attorney General has been made aware of it and they're in preparation.

THE COURT: Okay.

MR. ASKIN: At that point, then, Your Honor, the Court would have to follow the procedure laid out in the Reynolds case, and as Reynolds says, "Where there is strong showing of necessity on the part of the Plaintiff," and I think here we have a

strongest showing of necessity as imaginable, the fact that without the information, for example, the information as to what other agencies are involved, Plaintiff cannot pursue his constitutional claims, that there is no other possible source of that information, it says, "Where there is a strong showing of necessity, the claim of privileges should not be lightly accepted," and then it goes on to say, "Even the most compelling necessity, however, cannot overcome the claim if the Court is ultimately satisfied that military secrets are at stake."

I must tell you, Your Honor, I have grave doubts that there are really military secrets at stake in this case, and I think the Court would have to very seriously look at the Attorney General's declaration if in fact that claim were made.

Returning to the Vaughn index, there are two specific pieces of the Vaughn index I want to talk about, and again, I must tell you, sometimes, dealing with this kind of case, you feel like you're playing a game of blind man's bluff, and that's why I think in several cases the courts have said it is necessary that the Defendants put all of their Vaughn claims in one document. Frankly, running, trying to run through this, you run from document to document, from the Government's brief to the Thomas declaration to the Lieberman declaration to a second declaration, the Answers to Interrogatories, trying to figure out exactly what the claims are in each instance. But I want to refer specifically to two pieces of information hidden in these files which I don't think the Vaughn index accurately explains why we cannot have it.

The first is a very simple question: What is Todd Patterson's file prefix number, and why won't they tell us?

Now, let me tell Your Honor, that is a very, very important piece of information.

Now, Ms. Cassell has suggested that in the Laurie Paton case, at the top of her files was the word subversive. That's not true, Your Honor. At the top of her file was a file number 100, 100, dash, whatever the rest of her file was. It was the 100 which labeled that file subversive, because that's what the 100 meant in the F.B.I.'s classification system. The F.B.I. has a very extensive classification system in which files are identified by their prefix, two or three number prefix, if it's about bank robberies or espionage or national security or terrorism. The content of the

file, the content of the investigation is determined by the prefix.

We believe the Pattersons have a right to know what kind of classification the F.B.I. has given to Todd's file. Maybe it's under curious precocious teenager. Now, that wouldn't upset the Pattersons too much. Unfortunately, the last time I looked, the F.B.I. didn't have such a classification.

On the other hand, if it's classified with a prefix that says investigation of espionage or national security matter or subversive matter, then the Pattersons are much more concerned about this file being kept on Todd.

THE COURT: Wouldn't your concern diminish if the whole file is expunged?

MR. ASKIN: Some of the concern would diminish, Your Honor, let me respond to that, it's true, and Ms. Cassell says the

F.B.I. has now offered to expunge this file.

Why is that not sufficient for Todd's interests at this moment? And frankly, there are several reasons.

First of all, expunging his file is no guarantee against repetition. Todd continues to be curious. He continues to write to foreign governments. He continues to seek information. They expunge his file now, we don't know that they won't start up a new one tomorrow.

So expungement is no guarantee against Todd's future rights.

Secondly, he wants vindication of his rights, including the right to know just what his Government did to him and exactly what it recorded about him.

THE COURT: Well, don't I have to balance that against national security?

MR. ASKIN: Well, at some point, I

think you probably will, Your Honor, in fact, and again, if in fact you are convinced by the Government's presentations that somehow, this will really jeopardize some kind of military information and state secrets, the Reynolds case says you have to acknowledge their claim. But I think that burden is on Your Honor to carefully examine whether or not that is really, that there is such a -- that this is really true, that the impact on national security would be so significant that it really should preclude Todd from knowing exactly who did what to his mail, how and whether his constitutional rights were infringed and so forth.

I must tell Your Honor I litigated the Paton case for seven years, and the Government kept telling us, we can't divulge these files because tremendous

damage to the national security would be done, and finally, Judge Whipple said release the files, and suddenly it was demonstrated there was nothing of the slightest harm to national security contained in those files.

Now, unfortunately, it was a subterfuge, and that's the problem with these kinds of cases. The Government makes these claims, this boilerplate mumbo-jumbo about damage to national security interests, and as I say, it's very difficult to try to understand exactly what this is about, and that's why the Vaughn index must be so specific and so detailed.

I mean, I cannot imagine how there could be, and I think -- I can't imagine the Court will think that revealing the prefix which the F.B.I. has given to Todd's file is going to damage national

security.

On the question of these other agencies, documents four and five, let me talk about them in regard to the Vaughn index.

Documents four and five are both cover letters to which there are attachments of other pages which the F.B.I. will not release at all. They have been totally withheld. There are at least four pages as I understand the Lieberman and Thomas declarations. One document has 17 pages attached, of which three specifically refer to Todd, the other one has five pages attached, of which one refers to Todd, and those pages have been totally withheld from us.

The Government in its explanation in the Thomas declaration repeats some boilerplate language about threatened damage to national security, which,

frankly, is the exact, practically word for word identical to the boilerplate language which was offered in the King case, which the D.C. Court of Appeals says was inadequate, it's just boilerplate, it's categorical, it doesn't really mean anything, it's over broad, you've got to be more specific, so that the Court can really understand that, in fact, there's going to be -- what kind of danger is really threatened here.

So those four pages as well as, it seems to me, all this other information concerning who it was, I mean, I don't know that Ms. Cassell this morning suggests that there was some agency, and by the way, on the mail cover, Your Honor, the F.B.I. says it never tampered with Todd's mail. We never said the F.B.I. tampered with Todd's mail. We don't believe it was the F.B.I. tampered with

Todd's mail. We want to know what agency did tamper with Todd's mail. That's what we want to know. We never accused the F.B.I. of doing it. Ms. Cassell apparently states there was some kind of mail cover, it's the first concession we've had of that, in which some of Todd's initial replies from embassies were picked up.

Now, mail cover is regulated. Judge Whipple held the mail cover regulation unconstitutional. Now, the Postal Service went back and revised its mail cover regulation subsequent to the Paton case, but if there is a mail cover in place now, I don't know if that mail cover, we don't know if it was properly authorized, we don't know if it met the criteria required as a result of Judge Whipple's opinion and the new Postal Service regulation. We think we have a right to inquire into

that. Todd as an American citizen has a right to write for information, even to foreign embassies. That is his right as an American, and I don't know under what authority the F.B.I. -- well, not the F.B.I., whatever Federal agency, as I say, we don't believe it was the F.B.I., some other agency claims the right to intercept his mail to foreign embassies. We think that's a legitimate issue for trial in this case, but first we have to know who it was that was intercepting it and under what authority it was being intercepted. I mean, that is really precisely the same issue that was involved in Paton v. LaPrade 16 years ago in this courtroom.

On the issue, continuing the issue of why expungement of Todd's file is not an adequate remedy for him, the fact is, Your Honor, that every time the F.B.I. gets caught violating the rights of someone

like Todd and violating the Privacy Act, it thinks all it has to say is, oops, sorry about that, let's just wipe out the file and make believe it never happened, and thus placing themselves beyond judicial review, and the hundreds or maybe thousands of people who don't know about the F.B.I.'s violations of their rights, who don't know that the F.B.I. intercepted their mail and set up a file on them are never the wiser.

Todd is willing to try to help vindicate their rights, too, because he is interested not only in his own freedom of inquiry but in living in a society in which everyone else enjoys freedom of inquiry as well, because that's his right as well as their right, to live in a free society, and that's another reason why Todd would feel strongly about pursuing this case, about our motion to designate

this case as a class action, so that other people, not just those who happened to get lucky enough and catch the F.B.I. at what they're doing, that other people can have their rights vindicated, and once and for all make the F.B.I. abide by Section (e)(7) of the Privacy Act which it has honored in the breach for the past 14 years.

On the other two counts of Todd's complaint, again, initially, the Defendants ignored them totally. They tried to treat it as a FOIA case. They now seem to concede that maybe there's something more to this case than that, but even this morning, Ms. Cassell wants to suggest that what the Privacy Act is about is the misuse and dissemination of information, improper disclosure. She says the purpose of the Privacy Act is improper disclosure. That's not true,

Your Honor. The purpose of the Privacy Act was to stop the F.B.I. from maintaining files on hundreds of thousands or millions of Americans who were doing nothing more than exercising their rights of free speech and association under the Constitution of the United States. That's what Section (e)(7) was about. Whether of not the F.B.I. ever has used this information, has disclosed this information, the existence of this file with possibly a negative prefix on it in the F.B.I., six file cards somewhere with Todd's name on it, six separate files, three main files, three cross reference files, two in Washington, four in Newark, these files sit there.

Todd is a young man with his whole future ahead of him. He's interested in being a Foreign Service Officer. That's part of his interest in internal affairs

and what goes on with other countries. He wants to represent this Government. He's uneasy about having these six file cards and files in the F.B.I. with who knows what kind of classification on there, because he's going to be applying for Government service, and he has a right, as other Americans, that the F.B.I. not be keeping these kinds of files.

We've never challenged the right of the F.B.I. to open this investigation. Maybe they had the right. Again, maybe it was illegal on the interception of his mail, we still don't know, but if they found out, somebody, Laboratory Disposable Products was communicating with a foreign government, maybe they had the right to go out and ask some questions. They didn't have to start a file: Oh, it's a teenager, let's tear it up, let's throw it in the wastebasket, let's forget about

this thing right now.

So on Counts 2 and 3, it seems to me it's totally premature to even think about summary judgment. There are lots of issues involved, there seems to be lots of discovery to which we are entitled, and there are lot of -- I mean, if anybody is entitled to summary judgment in this case, it's probably the Plaintiff, but we don't ask for that now; we think it's premature. We're not asking for summary judgment, but we may be entitled to it because of what we know already. There's still a lot of discovery to be done; we'd still like to know what the F.B.I. justification is for maintaining these files. They give us vague and unspecific answers to our Interrogatories. I'm not sure whether you're hearing the motion on discovery or whether we're going before Magistrate Haneke, but there's a lot of issues

involving Counts 2 and 3 of this complaint, and I think they should all be -- we can't decide them pending the resolution of the discovery issues.

So rather now to try to even plod through the rest of the Vaughn index and the other aspects of our Count 1 claim, I would suggest that the Court hold that the summary judgment motion is premature, let us try to proceed with our discovery motion either before Your Honor of before Magistrate Haneke, and see if some progress can be made via that route.

THE COURT: Thank you.

Ms. Cassell, any brief rebuttal?

MS. CASSELL: Your Honor, to the extent that Mr. Askin suggests that I conceded that there was some mail cover or interception of Todd Patterson's mail, that is absolutely untrue.

MR. ASKIN: Oh, okay.

MS. CASSELL: What I indicated was, if mail was opened anywhere, it was probably in a foreign country.

THE COURT: Under their mail cover.

MS. CASSELL: For whatever reason.

Secondly, Mr. Askin --

THE COURT: Mr. Askin, I agree: She never said that the mail was opened under some mail cover.

MR. ASKIN: I totally misunderstood. I thought she said there had been a flurry of mail to some foreign embassies, so naturally the F.B.I. got concerned.

MS. CASSELL: I said that information was received by the F.B.I. that Mr. Patterson had written to these embassies. I never indicated that there was a mail cover or that his mail was opened in any way.

MR. ASKIN: Well, mail cover doesn't include openings. I didn't say there was

openings at that point.

THE COURT: I understand, but I never took the remark to say that there was a mail cover.

MS. CASSELL: Thank you, Your Honor. Secondly, the offer to expunge Todd Patterson's file was made at the beginning of this litigation, probably August, at the latest, September, before these motions were filed.

THE COURT: What about Mr. Askin's assertion, the F.B.I. gets caught with its slip showing, and then all of a sudden it says, I'm going to hike it up and expunge?

(Laughter.)

MS. CASSELL: Your Honor, that is not the position, because, in the Paton case, all that the Plaintiff wanted was to have her file expunged, and the F.B.I. didn't want to do it. It's not because every time they get caught; it is because Todd

Patterson is so unbelievably unimportant to the F.B.I. He's a kid. If we knew he was a kid when he wrote originally, maybe this wouldn't have occurred, but we didn't know. The F.B.I. would have been remiss in not investigating him at the time. Now they know he's a kid. One reason to keep a file would be so the next time he writes, we wouldn't have to go back and do the same thing again. When the airtel came and they received more information about Todd Patterson, they looked in his file and they said, he's a kid, he's writing an encyclopedia of the world; we've already been through that drill. That's one reason --

THE COURT: Do all 11 and 12 year olds have to be fearful that they may have to go through the same experience as Mr. Patterson if they write to foreign governments and make the inquiry that he

made if they just put it in a normal envelope and on the back maybe write, SWAK?

(Laughter.)

THE COURT: You know, is it --

MS. CASSELL: Your Honor, I'm not sure what guidelines the F.B.I. has under its national security mandate, but I will say that I doubt the Mr. Patterson was so worried. If he was so worried, why did he call the agent himself in 1985 and say, they invited me to come to the Soviet Mission; what do you think, should I go, shouldn't I go? That doesn't sound like somebody who was intimidated and afraid by the fact that the F.B.I. knew that he was writing an encyclopedia.

THE COURT: Do you think that the use of his father's envelopes placed him in this position as opposed to using plain envelopes to foreign governments?

MS. CASSELL: I certainly don't think it helped. If he had no return address on the envelope, that would have been better yet.

But I think that Mr. Askin is incorrect with regard to the Paton case. There was no numerical prefix in the Paton case. There was a letter abbreviation that said SM, subversive matter, and SW, Socialist Worker Party, and the Court made it clear that while some people may not regard those letters as being pejorative connotations, that some might feel that they were.

In this case, there are no letter prefixes on the file. However, the material that is on the file relates to certain matters which are very privileged. It is true that the information with regard to Mr. Patterson is not --

THE COURT: It's the sources they

will reveal, and methods.

MS. CASSELL: Correct, Your Honor. We released in unredacted form the fact that the agent went to Todd's home and he was writing an encyclopedia and all that. They knew before, they knew it now. That can't be what they're interested in. We've offered to expunge the files.

THE COURT: What about Mr. Askin's request about, why can't I even get the file number? How does that affect national security?

MS. CASSELL: Because the file number relates to other types of investigations of a similar nature. Perhaps it indicates sources that gave the information, all of which is highly privileged. Of what interest would it be to Mr. Askin whether the number was 123 or 56 if he doesn't know what it meant?

THE COURT: Well, obviously he knows

what it means.

MS. CASSELL: Then he doesn't need the information if he knows what it is. He has no need for Todd Patterson's file prefix. What he needs to know is that there's nothing in there that's going to hurt Mr. Patterson when and if he applies to the Foreign Service, and I submit to Your Honor that the expungement of his file will more than satisfy that. There will be no file.

THE COURT: All right.

Any quick reply, Mr. Askin?

MR. ASKIN: Just very briefly, Your Honor.

First of all, if there was no mail cover, then it was clearly unconstitutional, the interception of his mail. If there was a mail cover, maybe it was properly authorized under the mail cover regulation. If there was no mail

cover, I don't think there's any authority for any Government agency to be intercepting Todd's letters to some foreign government, and it's obvious that from the facts we must draw the assumption that the letters were intercepted on the way out of the country or on the way to the embassy from Todd because that's the only way in which the name Laboratory Disposal Products would have come to the attention of the F.B.I., because, when foreign countries wrote back to Todd, they wrote to Todd; they weren't writing to Laboratory Disposable Products. So it had to have been from interception of Todd's letters, as far as we can stress, I understand.

Secondly, about Todd was not worried, the family was not worried initially, and it's absolutely true. When the family got worried is when they asked for his file

when he was 15 years old and the F.B.I. says, oh, we can't give you that, it's classified in the interests of national security. That's when the family got worried, as any family would get worried when the F.B.I. tells them they've got a file on their kid and it's classified for national security reasons. That's what caused the concern.

Thank you, Your Honor.

THE COURT: All right. There's been a lot of argument this morning. The Court's had an opportunity to review briefs. I'm going to reserve as to all three counts, but on Count 2, I'm going to require the Government to do the following.

I'm not satisfied that the F.B.I. has demonstrated that the files maintained on claim of exercise of first amendment rights were pertinent to an authorized law

enforcement activity as required by the Privacy Act. In its current affidavits, the F.B.I. merely cites to the Espionage Act and to the Foreign Agents Reservation Act. That is not sufficient to maintain records on citizens' exercise of first amendment rights except when related to specific law enforcement objectives.

Therefore, I'm ordering the F.B.I. to submit an additional affidavit in camera detailing how the records maintained on Mr. Patterson were pertinent and related to a specific law enforcement activity of the F.B.I. By requiring the F.B.I. to articulate a sound law enforcement basis for its maintenance of records on Mr. Patterson, this Court can then be assured that no blanket surveillance and maintenance of records on citizens' exercise of first amendment rights is or was being undertaken in violation of the

Privacy Act.

The Court will issue a full opinion on this matter in a very short period of time, perhaps even by the end of this week. You will be notified.

Court will be in recess.

MR. ASKIN: Excuse me, Your Honor. Does that mean that the motions for the class action will just be in abeyance pending your determination?

THE COURT: Yes, pending my determination. They have not been granted or denied.

MR. ASKIN: Thank you, Your Honor.

THE COURT: They are pending.

All right.

(Matter concluded.)

Pursuant to Section 753, Title 28, United States Code, the foregoing transcript is certified to be an accurate record as taken stenographically in the above entitled proceedings.

_____

CHARLES P. McGUIRE, C.S.R.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON,	:	Civil Action No. 88-2319
Plaintiff,	:	
v.	:	Hon. Alfred M. Wolin
FEDERAL BUREAU OF PLAINTIFF'S INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United Stated Government,	:	STATEMENT MATERIAL FACTS PURSUANT TO RULE 12(f)
Defendants.	:	

1. Plaintiff Todd Patterson, age 17, is a senior at Don Bosco Prepatory High School in Ramsey, New Jersey and is a lifelong resident of New Jersey.

2. In 1983, while a sixth grade elementary school student, Todd decided to write an encyclopedia of the world. (See Affidavit of Todd Patterson.)

3. The resources of the local library being outdated, Todd wrote to all the countries of the world, 169 in all, to obtain information. Plaintiff enclosed his information in envelopes bearing the return address of Laboratory Disposable Products, a business his parents operate from their home. (See Affidavit of Todd Patterson.)

4. These information requests were sent to addresses both within and outside the United States. Plaintiff received information from most of the countries to which he wrote. Many of these pieces of correspondence were received in damaged condition. (See Affidavit of Todd Patterson.)

5. Sometime in the latter half of 1983, John E. Butenschoen, identifying himself as an agent of the FBI's Parsippany, New Jersey, branch, appeared

unannounced at the plaintiff's home in North Haledon, New Jersey. Agent Butenschoen was invited in by plaintiff's mother, Betsy Sue Roughgarden Patterson, and talked to her and plaintiff's father, Edgar Patterson, the latter by telephone, concerning plaintiff's project. Agent Butenschoen was shown Todd's room, the information recieved by plaintiff, and what Todd was doing with the information. (See Affidavit of Betsy Sue Roughgarden Patterson.)

6. Agent Butenschoen requested that plaintiff, who was at elementary school at the time of the visit, call the agent. (See Affidavit of B. Patterson.) Shortly after the visit, plaintiff did call Agent Butenschoen and spoke with him regarding plaintiff's project and information requests. (See Affidavit of T. Patterson.)

7. On or about July 13, 1983, an FBI airtel was written relating to Laboratory Disposable Products and was placed in at least one file on Todd Patterson. (See Document No. 1 attached to defendant's Notice of Motion for Summary Judgment.) The document requests that the Newark Division "conduct appropriate investigation regarding the captioned company."

8. As a result of Agent Butenschoen's investigation, a FBI memorandum was written on or about February 23, 1984. (Document No. 2 attached to defendant's Notice of Motion for Summary Judgment.) This document changed the subject from "Laboratory Disposable Products" to "Todd Patterson." The memorandum further states "Newark indices as well as local criminal checks negative on subject" and "[i]n view of the

above, Newark comtemplates no further investigation in this matter."

9. From 1983 to the present, plaintiff has received at least fifty pieces of mail in damaged condition. Most of the damaged mail has come from the Soviet Union. Some of this mail arrived opened or devoid of contents. (See Affidavit of T. Patterson.)

10. One envelope addressed to plaintiff from the Soviet Mission in New York City was resealed and stamped "Received in damaged condition by the Postal Service." In this envelope was an envelope from Sweden addressed to a total stranger in Wayne, New Jersey (See Affidavit of T. Patterson.)

11. On or about January 5, 1984, plaintiff wrote to the Postmaster General to ask why he was receiving so much mail in damaged condition. (See Affidavit of

T. Patterson.)

12. Theodore W. Troy, Director of the Office of Mail Classification, replied by letter dated February 15, 1984, that the Postal Service had no explanation for the damaged mail. (See Affidavit of T. Patterson.)

13. Sometime during the summer of 1984, Todd Patterson received an invitation for a visit from the Soviet Mission in New York City. Concerned that the FBI was still monitoring plaintiff's activities, plaintiff's father requested that Todd contact Agent Butenschoen. Plaintiff's father had passed the mission many times and felt that U.S. government agencies were monitoring all traffic in and out of the mission. Having already had a shocking FBI visit, plaintiff's father was apprehensive but felt that the visit would be a good experience for Todd.

(See Affidavit of T. Patterson, Exhibit A-8 attached to defendant's Notice of Motion for Summary Judgment.)

14. Plantiff contacted Agent Butenschoen and informed him of the invitation. The agent requested that Todd report back to him after the visit. As requested, plaintiff reported to Agent Butenschoen the details of the visit. (See Affidavit of T. Patterson.)

15. Defendant has stated that no further investigation or inquiry in regard to plaintiff was conducted after Agent Butenschoen's surprise visit to plaintiff's home in 1983. (See Defendant's Objections and Responses to Plaintiff's First Set of Interrogatories to Defendants, Interrogatory No. 22.) However, at least one of the files maintaining information on plaintiff includes a FBI airtel dated December 5,

1985 with six enclosures. (Document No. 5 attached to defendant's Notice of Motion for Summary Judgment.) Defendant has refused to release the attachments to this airtel and has released only a heavily excised copy of the airtel itself. (Declaration of Special Agent Thomas, pp. 18-20.)

16. In the latter half on 1983, plaintiff's family began hearing strange background noises on its residence and business telephones, including voices. These noises being distinguishable from commonly occuring interference, Todd's parents suspected their telephcnes were being tapped. (See Affidavit of B. Patterson.) In April, 1986, moreover, an employee of the Patterson's, Don Methven, now deceased, picked up his telephone and heard a voice say "Operator, this is not the phone I want tapped." Mr. Methven,

very shaken by the incident, reported it to Edgar Patterson because Mr. Methven's phone was hooked-up to the Patterson's business phone by a call-forwarding service. (See Affidavit of B. Patterson.)

17. In early 1987, plaintiff learned that he could request access to any records the FBI might be maintaining on him. Plaintiff made a reqeust to the FBI in Washington, DC, for "copies of my personal file in your records." (Exhibit A-1 attached to defendant's Notice of Motion for Summary Judgment.)

18. On or about August 12, 1987, plaintiff was informed that "[t]he information pertaining to you in FBIHQ records is exempt from disclosure pursuant to Title 5, United States Code, Section 552(b)(1) and Title 5, United States Code, Section 552a(j)(2)." (Exhibit A-7 to defendant's Notice of Motion for Summary

Judgment.)

19. Plaintiff and his parents were extremely upset by the denial of Todd's request. (See Exhibit A-8 attached to defendant's Notice of Motion for Summary Judgment, Affidavit of T. Patterson, Affidavit of B. Patterson.) Plaintiff's parents are very proud of Todd, his initiative and his goals. Todd plans to pursue a career with the Department of State upon completion of his education. He intends to go to college and major in Canadian Studies. In the summer of 1987 Todd had an interview with the Director of the Canadian Studies Program at SUNY College in Plattsburg, New York and the school, Todd, and his parents are hopeful for Todd's future enrollment. (See Affidavit of T. Patterson.) Todd and his parents are concerned that the existence of classified FBI files on Todd may

jeopardize his ambitions for a career in the U.S. Government's foreign service.

20. On or about August 20, 1987, plaintiff, by way of his father, Edgar Patterson, appealed the FBI's denial in a letter to the Department of Justice's Office of Information and Privacy. (Exhibit A-8 attached to defendant's Notice of Motion for Summary Judgment.)

21. On or about October 20, 1987, Richard L. Huff, Co-Director of the Office of Information and Privacy, Department of Justice, stated in a letter to Edgar Patterson that denial of Todd's request was affirmed. (Exhibit A-10 attached to defendant's Notice of Motion for Summary Judgment.)

22. On or about November 24, 1987, Richard Huff again wrote to Edgar Patterson. He explained that following review by the Department Review Committee,

six pages of Todd Patterson's file were being declassified. The remainder of the file "continues to be exempt from mandatory release on the basis of 5 U.S.C. 552 (b)(1)." (Exhibit A-11 attached to defendant's Notice of Motion for Summary Judgment.) Along with his letter, Huff enclosed six pages of declassified material, which were heavily excised.

23. Defendant stated that collection of information about plaintiff was begun pursuant to a foreign counter-intelligence investigation conducted by the FBI. (See Defendant's Objections and Responses to Plaintiff's First Set of Interrogatories to Defendant, Interrogatory No. 16.) Neither plaintiff, Edgar Patterson, Betsy Sue Roughgarden Patterson, nor Laboratory Disposable Products has committed any act violative of federal law or which could have given rise to reasonable suspicion

that any federal law was being violated.

24. The FBI continues to maintain information regarding Todd Patterson's exercise of the First and Fourth Amendment rights in a total of six files. (Declaration of Leiberman, p.7.)

25. Maintenance of such information has not been authorized by plaintiff, Edgar Patterson or Betsy Sue Roughgarden Patterson.

26. Maintenance of such information is not pertinent to or within the scope of an authorized law enforcement activity.

27. Maintenance of such information is not expressly authorized by statute.

28. Since February of 1984, the FBI has not considered further investigation of Todd Patterson to be warranted.

FRANK ASKIN, ESQ.
Constitutional Litigation Clinic
Rutgers University School of Law
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687
Attorney for Plaintiff on
behalf of the American Civil
Liberties Union of New Jersey

This 28th day of October, 1988.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON Plaintiff, v. FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, JOHN DOE AGENCY, an unknown agency of the United States Government Defendants.	: :Civil Action :No. :88-2319 : : :Hon. Alfred M. :Wolin

STATE OF NEW JERSEY)ss.
COUNTY OF ESSEX)

TODD PATTERSON, being duly sworn on oath, deposes and says:

1. I am a 17 years old student at Don Bosco Preparatory School and I am the plaintiff in this case. I am and have been, at all times relevant hereto, a citizen of the United States.

2. While a 6th grade elementary school student, I decided to write an encyclopedia of the world.

3. After exhausting the resources of a local library, in early 1983, I began to write letters requesting information to all the countries of the world. I wrote to 169 Nations in total. Requests for information were enclosed in envelopes bearing the return address of Laboratory Disposable Products, a business my parents operate from our home.

4. I received information from most of the countries I contacted, including the Soviet Union and other Communist countries.

5. From 1983 to the present, I have received at least fifty pieces of mail in damaged condition. Most of this damaged mail has arrived opened or devoid of contents. One envelope addressed to me

from the Soviet Mission in New York City was resealed and stamped "Received in damaged condition by the Postal Service." In this envelope was an envelope from Sweden addressed to a total stranger in Wayne, New Jersey. I deposited this letter in a mail box without opening it.

6. On or about January 5, 1984, I wrote to the Postmaster General to ask why I was receiving so much mail in damaged condition.

7. Theodore W. Troy, Director of the Office of Mail Classification, replied by letter, dated February 15, 1984, that the Postal Service had no explanation for the problem. I have continued to receive mail in damaged condition.

8. In the Summer of 1984, I received an invitation from the Soviet Mission in New York City. The invitation was extended to enable me to gather additional

information about the Soviet Union for my encyclopedia project. I informed FBI agent Butenschoen, who had previously visited my home to inquire about my activities, that I had received the invitation. Agent Butenschoen requested that I report back to him after the visit.

9. On or about September 3, 1984, I visited the Soviet Mission with my father, Edgar Patterson. As requested, I reported to Agent Butenschoen the details of my visit.

10. In early 1987, I learned that I could request access to any records the Federal Bureau of Investigation might be maintaining on me. I made a request to the FBI for release of records on or about May 28, 1987.

11. On or about August 12, 1987, Emil P. Moschella, Chief of the Freedom of Information-Privacy Acts Section of the

Records Management Division of the FBI responded to my request. He explained that the FBI would not release any of the records it maintained on me because the records were exempt from disclosure pursuant to 5 U.S.C. Section 552(b)(1) and 5 U.S.C. Section 552a(j)(2).

12. On or about August 20, 1987, by way of my father, Edgar Patterson, I appealed the FBI's decision in a letter to the Department of Justice's Office of Information and Privacy.

13. On or about October 20, 1987, the Department of Justice denied my appeal. Richard L. Huff, Co-Director of the Office of Information and Privacy, stated in a letter to Edgar Patterson that I was "the subject of one Bureau main file and is alluded to briefly in one other file." It was explained to me that access to it was being denied on the basis on 5 U.S.C.

552(b)(1). He further stated that the material was being referred to the "Department Review Committee for review and determination whether it warrants continued classification under Executive Order 12356." Subsequently, I did receive portions of my heavily excised files.

14. When I complete my education, I hope to possibly pursue a career with the State Department. I am deeply concerned that my plans may be jeopardized by the FBI's continued maintenance of a file bearing my name that is marked classified in the interest of national defense or foreign policy. It is my understanding that whenever an individual applies for a governmental position that requires security clearance, the FBI is asked to provide any files it maintains on that individual.

15. Next year I hope to be

participating in the Canadian Studies Program at SUNY Plattsburgh, New York. During the third year of the program students have the opportunity to work with the Canadian Parliament. A security clearance, however, is required. I fear that the very existence of an FBI file may jeopardize my participation in the SUNY program. For this reason I ask that the contents of my file be released for my inspection.

16. I am a seventeen year old student and pose no threat to National security or the National defense.

_____
TODD PATTERSON

Sworn and subscribed before me this
27th day of October, 1988

_____
FRANK ASKIN, ESQ.
Attorney-at-Law
State of New Jersey

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON, Plaintiff,	Civil Action No. 88-2319
v.	
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the Unites States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government, Defendants.	Hon. Alfred M. Wolin

STATE OF NEW JERSEY: ss.
COUNTY OF ESSEX :

AFFIDAVIT OF BETSY SUE ROUGHGARDEN PATTERSON
IN SUPPORT OF PLAINTIFF'S
OPPOSITION TO SUMMARY JUDGEMENT

I, Betsy Sue Roughgarden Patterson, residing at 16 Morningside Avenue, North Haledon, New Jersey, of full age, being duly sworn upon my oath, depose and state

as follows:

1. I am the mother of Todd Patterson.

2. In the latter half of 1983, I began hearing strange background noises whenever I used my home telephone. These noises bore no resemblance to static or other intrusive sounds which occassionally interfere with regular telephone use. This problem persisted for several months with respect to both our residence phone and business phone, also located in our home, with voices becoming part of the background noise. My husband and I suspected that our telephones were being tapped. One day my husband became so exasperated with this situation that he yelled into the receiver of the business phone, "If you want to know anything, come here yourself and find out." He then slammed down the phone in disgust.

3. Two days later, in late 1983, an FBI agent named John Butenschoen arrived unannounced at my door. I was so taken aback by his sudden appearance that I reflexively shut the door on him. At that precise moment, I had been speaking on the phone to my husband, Edgar Patterson, who was equally shocked by the agent's surprise visit.

4. Upon entering my home, Mr. Butenschoen spoke with my husband on the phone and then proceeded to Todd's room, where he took note of the 35 binders containing Todd's research material. He did not examine the contents of the binders, although I offered him access to all the materials. Instead, Agent Butenschoen requested that plaintiff, who was at elementary school at the time of the visit, call the agent.

5. The telephone disturbances

persisted after the FBI agent's visit. In April, 1986, however, another unsettling incident occurred which involved an employee of ours named Don Methven, now deceased. Mr. Methven was physically handicapped and for his convenience he was permitted to perform his work at home. He had a hook-up to a call-forwarding service which my husband and I utilized for business. One day he picked up his telephone and overheard a voice say "Operator, this is not the phone I want tapped." Mr. Methven was very shaken by this incident and immediately reported it to my husband.

6. I am deeply concerned about the surveillance activities directed against my son and the repercussions that such activities may have on his future. Next year Todd hopes to be participating in the Canadian Studies Program at SUNY in

Plattsburgh, New York. During the third year of the program, students have the opportunity to work with the Canadian Parliament. A security clearance, however, is required. I fear that the very existence of an FBI file may jeopardize my son's participation in the SUNY program and his aspirations for a career as a foreign service officer for the United States Government. For this reason, I ask that the contents of his FBI file be released for my inspection.

7. I file this affidavit in support of my request. I state that all information contained herein is true and correct to the best of my knowledge and belief.

BETSY SUE ROUGHGARDEN PATTERSON

Sworn and subscribed before
me this 27th day of October, 1988.

_____

FRANK ASKIN, ESQ.
Attorney-at-Law
State of New Jersey

UNITED STATE DISTRICT COURT
DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON, Plaintiff, vs. FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government, Defendants.	Civil Action No. 88-2319 Hon. Alfred M. Wolin NOTICE OF MOTION TO COMPEL DISCOVERY

TO: SUSAN C. CASSELL
Assistant United States Attorney
970 Broad Street
Newark, New Jersey 07102

MADAM:

PLEASE TAKE NOTICE that on November 14, 1988, at 10:00 am, plaintiff will move before the court before the Honorable Alfred M. Wolin, J.D.C., at United States Court House, Newark, New Jersey, for an

order to compel defendants to comply with the following demand for discovery.

More responsive answers to the following Interrogatories from the First Set of Interrogatories to defendants: Interrogatories Numbers 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 24, 25, 26, 27, 28, and 29. A copy of the Interrogatories propounded and of defendants' objections and answers is attached hereto.

The reason for this Motion is that defendants in their answers to the specified Interrogatories failed to respond, gave evasive or incomplete responses, and/or inappropriately claimed privileges, and thus did not adequately reply to Interrogatories presented. In support of this motion, plaintiff relies upon the Affidavit of Frank Askin, Esq., the Affidavit of David Peterson, and the

Memorandum in Support submitted herewith.

Respectfully submitted,

FRANK ASKIN
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
(201) 648-5687
Attorney for Plaintiff
On Behalf of the American
Civil Liberties Union of
New Jersey

DATED: October 20, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON, Plaintif, v. FEDERAL BUREAU OF INVESTIGATION, JON DOE, an unknown employee of the United States Government, an JOHN DOE AGENCY, an unknown agency of the United States Government Defendants.	Civil Action No. 88-2319 Hon. Alfred M. Wolin DEFENDANT'S OBJECTIONS AND RESPONSES TO PLAINTIFF'S FIRST SET OF INTERROGATORIES TO DEFENDANTS

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, defendant Federal Bureau of Investigation (FBI) and the undersigned officials duly authorized to answer in its behalf hereby respond to plaintiff's interrogatories as follows:

INTERROGATORY NO. 1:

1. Does the defendant maintain a

file concerning the plaintiff, Todd Patterson? If so,

a. Under what number or numbers are such files listed?

b. What is the prefix of this file and what does this prefix mean?

c. Under what statutory authority is this file maintained?

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets privilege. The information sought by the interrogatory is further exempt from disclosure under Freedom of Information Act (FOIA), 5 U.S.C. § 552, pursuant to FOIA Exemption 1. 5 U.S.C. § 552 (b)(1). Notwithstanding its objection, defendant will address the information sought by

Interrogatory No. 1 in the declaration of Special Agent (SA) David R. Lieberman and SA Philip W. Thomas which will be filed along with defendant's motion for summary judgment on or about September 25, 1988. Plaintiff is also referred to 44 U.S.C. § 3101, et seq., 36 C.F.R Parts 1220 and 1228 which govern the management and disposal of agency records. The FBI's Records Disposition and Retention Schudule, established pursuant to 36 C.F.R. Part 1228, was approved by the Archivist of the United States on March 9, 1987, and forwarded to the National Archives, Washington, DC 20408.

INTERROGATORY NO. 2:

2. Does the defendant maintain any files concerning Todd Patterson's father, Ed Patterson, or mother, Betsy Sue Roughgarden Patterson? If so,

a. Under what number or numbers are

such files listed?

b. What are the prefixes of the files and what do the prefixes mean?

c. Under what statutory authority are these files maintained?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. This interrogatory futher calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets privilege and which is exempt from disclosure under the FOIA pursuant to FOIA Exemption 1. 5 U.S.C. § 552 (b)(1). Defendant further objects to disclosing names or other personally identifying information in contravention

of the Privacy Act, 5 U.S.C. § 552a.

INTERROGATORY NO. 3:

Does the defendant maintain a file concerning plaintiff's father's company, Laboratory Disposable Products? If so,

a. Under what number or numbers are such files listed?

b. What is the prefix of this file and what does this prefix mean?

c. Under what statutory authority is this file maintained?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. This interrogatory further calls for the release of information which is protected from disclosure as privileged pursuant to

the military state secrets privilege and which is exempt from disclosure under the FOIA pursuant to FOIA Exemption 1. 5 U.S.C. § 552(b)(1). Defendant further objects to disclosing names or other personally identifying information in contravention of the Privacy Act, 5 U.S.C. § 552a.

INTERROGATORY NO. 4:

Are there any documents in the Todd Patterson file other than the six pages previously turned over to plaintiffs? If so, attach copies.

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets privilege and which is further exempt from disclosure under the FOIA pursuant to FOIA Exemption 1. 5

U.S.C. § 552 (b)(1). Notwithstanding its objection, defendant will address the information sought by Interrogatory No. 4 in the declarations of SA David R. Lieberman and SA Philip W. Thomas which will be filed along with defendant's motion for summary judgment on or about September 25, 1988. Defendant further states that by letter dated August 26, 1988, the FBI released responsive information to plaintiff. This release was made pursuant to plaintiff's Privacy Act request submitted to the FBI's Newark field office.

INTERROGATORY NO. 5:

Are there other files cross referenced to either Todd Patterson, or his parents, Edgar Patterson or Betsy Sue Roughgarden Patterson, or their family business, Laboratory Disposable Products

on any type of index? If so, describe each of these files and their contents. Attach a copy of the index.

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. Defendant also objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets privilege and which is exempt from disclosure under the FOIA pursuant to FOIA Exemption 1. 5 U.S.C. § 552(b)(1). Defendant further objects to disclosing names or other personally identifying information in contravention of the Privacy Act, 5 U.S.C. § 552a.

Notwithstanding its objections, defendant will address the information sought by Interrogatory No. 5 as it pertains to Todd Patterson in the declarations of SA David R. Lieberman and SA Philip W. Thomas which will be filed along with defendant's motion for summary judgment on or about September 25, 1988.

INTERROGATORY NO. 6:

For what purpose does the FBI maintain a file on either Todd Patterson, or his parents, Edgar Patterson, or Betsy Sue Roughgarden Patterson or their family business, Laboratory Disposable Products and under what conditions would maintenance of this/these file[s] be discontinued?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly

burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets privilege and which is exempt from disclosure under the FOIA pursuant to FOIA Exemption 1. 5 U.S.C. § 552(b)(1). Defendant also objects to disclosing names or other personally identifying information in contravention of the Privacy Act, 5 U.S.C. § 552a. Notwithstanding its objections, defendant will address the information sought by Interrogatory No. 6 as it pertains to Todd Patterson in the declarations of SA David R. Lieberman and SA Philip W. Thomas which will be filed along with defendant's

motion for summary judgment on or about September 25, 1988. Finally, plaintiff is referred to 44 U.S.C. § 3101, et seq., 36 C.F.R. Parts 1220 and 1228 and the FBI's Records Disposition and Retention Schedule, established pursuant to 36 C.F.R. Part 1228, which govern the management and disposal of agency records.

INTERROGATORY NO. 7:

Does the FBI maintain an abstract on plaintiff, Todd Patterson, as described at 53379 Federal Register, Vol. 42, #190 (9/30/77)? If yes, attach a copy of it:

RESPONSE:

No.

INTERROGATORY NO. 8:

State the names of any officials of the FBI who authorized the establishment of a file on Todd Patterson. What are their official titles and who are their

superiors?

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the investigatory files privilege and which is further exempt from disclosure under the FOIA pursuant to Exemption 7(C). Notwithstanding its objection, defendant will address the information sought by Interrogatory No. 8 in the declaration of SA David R. Lieberman which will be filed along with defendant's motion for summary judgment on or about September 25, 1988.

INTERROGATORY NO. 9:

State the names of any officials of the FBI who authorized the continuing maintenance of a file on Todd Patterson. What are their official titles and who are

their superiors?

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the investigatory files privilege. Plaintiff is referred to 44 U.S.C. § 3101, et seq., 36 C.F.R Parts 1220 and 1228 and the FBI's Records Disposition and Retention Schedule, established pursuant to 36 C.F.R. Part 1228, which govern the management and disposal of agency records.

INTERROGATORY NO. 10:

Do any officials periodically review the necessity to continue maintenance of information about Todd Patterson? State their names, titles, and how often such a periodic review is conducted, and what agency guidelines are used in making their

decisions.

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the investigatory files privilege. Plaintiff is referred to 44 U.S.C. § 3101, et seq., 36 C.F.R Parts 1220 and 1228 and the FBI's Records Disposition and Retention Schedule, established pursuant to 36 C.F.R. Part 1228, which govern the management and disposal of agency records.

INTERROGATORY NO. 11:

Is maintenance of a file on Todd Patterson pertinent to and within the scope of an authorized law enforcement authority? If so, state the nature of such law enforcement authority and set forth the source of its authorization.

RESPONSE:

Maintenance of a file on Todd Patterson is within the scope of the FBI's law enforcement authority as set forth at 28 U.S.C. § 533 and C.F.R. § 0.85.

INTERROGATORY NO. 12:

Is maintenance of a file on Todd Patterson authorized by any statute? If so,

a. What statute provides the authority?

b. What official authorized the activity?

c. What other agency official reviewed the decision?

RESPONSE:

a. See 44 U.S.C. § 3101, et seq., 36 C.F.R Parts 1220 and 1228 and the FBI's Records Disposition and Retention Schedule

established pursuant to 36 C.F.R. Part 1228.

b. Defendant objects to Interrogatory No. 12.b. as it calls for the release of information which is protected from disclosure as privileged pursuant to the investigatory files privilege.

c. See Defendant's Response to Interrogatory No. 12.b.

INTERROGATORY NO. 13:

How does the FBI define the meaning of "authorized law enforcement activities" as used in the Privacy Act, 5 U.S.C. Section 552(e)(7)?

RESPONSE:

See Defendant's Response to Interrogatory No. 11. The general functions of the FBI established in accordance with the agency's law

enforcement authority are described at 28 C.F.R. § 0.85.

INTERROGATORY NO. 14:

Does the FBI have any official guidelines and procedures to determine whether or not individual files fit the meaning of "authorized law enforcement activity" found in Section (e)(7) referred to above? If yes, describe such guidelines and procedrues fully. If not, state whether any such guidelines or procedures are in the process of being prepared.

RESPONSE:

See Defendant's Response to Interrogatory Nos. 11 and 13.

INTERROGATORY NO. 15:

State the reason why the FBI decided to collect information about either Todd

Patterson, his parents, Edgar Patterson, Betsy Sue Roughgarden Patterson, or their business, Laboratory Disposable Products, initially. Name any officials and their official status at the time who did, or who probably did, review the decision to collect information on either Todd Patterson, his parents, Edgar Patterson, or Betsy Sue Roughgarden Patterson, or their business, Laboratory Disposable Products.

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to this interrogatory as it calls for the release of information which is protected from

disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C). Defendant also objects to disclosing names or other personally identifying information in contravention of the Privacy Act, 5 U.S.C. § 552a.

INTERROGATORY NO. 16:

Under what authority was collection of information about plaintiff begun?

RESPONSE:

The FBI conducted a foreign counterintelligence investigation. The agency's authority for conducting this type of investigation is encompassed by the agency's general law enforcement authority as set forth at 28 U.S.C. § 533 as well as more specific federal statutes,

including 18 U.S.C. §§ 792 - 798 (Espionage) and 22 U.S.C. §§ 611 - 621 (Foreign Agents Registration Act).

INTERROGATORY NO. 17:

Explain fully what groups or individuals have access to the file kept on plaintiff, Todd Patterson.

RESPONSE:

FBI employees are granted access to information maintained by the FBI on plaintiff Todd Patterson as necessary in the conduct of the ordinary course of FBI business.

INTERROGATORY NO. 18:

Explain fully what groups or individuals may request information which the Bureau may extract from the files kept on plaintiff, Todd Patterson.

RESPONSE:

Any individual may submit a request pursuant to the FOIA, 5 U.S.C. § 552 for records maintained by the FBI on a particular individual. Information may also be disseminated pursuant to the conditions of disclosure of the Privacy Act, 5 U.S.C. § 552a(b)(1-12), including for a routine use pursuant to 5 U.S.C. § 552a(b)(3). Routine uses of records maintained in the FBI Central Records System are set forth at 51 Fed. Reg. 3688 (1986).

INTERROGATORY NO. 19:

Indicate whether a request by a government agency, (e.g., the U.S. Department of State), for a background check on plaintiff, Todd Patterson, would produce any information whatsoever. If so, please state:

a. What information would be released: information from his file, summaries of such information, or simply an explanation that a file exists which cannot be released without plaintiff's permission.

b. If no information would be released, state whether the FBI would tell the plaintiff that an identity check was conducted but that its result was negative.

c. If you are unable to answer (a) or (b), state the names of person who could provide responses to these questions as well as the last know addresses of such persons.

RESPONSES:

Information would be provided in accordance with a routine use established by defendant for records maintained in the FBI Federal Records System. See 51 Fed.

Reg. 3688.

INTERROGATORY NO. 20:

Has any individual or any agency ever been supplied information on plaintiff, Todd Patterson, by the FBI? If yes, list dates, names to whom access has been granted, what information has been supplied and under what authority such access has been provided.

RESPONSE:

With the exception of plaintiff Todd Patterson, no individual or agency has been supplied information on plaintiff by the FBI.

INTERROGATORY NO. 21:

Has the FBI treated plaintiff's file in a manner any way different from the routine use of similar records?

RESPONSE:

No.

INTERROGATORY NO. 22:

After FBI Agent John E. Butenschoen's visit to plaintiff Todd Patterson's home, did defendant conduct any further investigation or inquiry in regard to Todd Patterson? If so, explain the nature of such investigation or inquiry.

RESPONSE:

No.

INTERROGATORY NO. 23:

In addition to any files maintained at FBI headquarters in Washington, D.C., does the Newark office of the FBI maintain any files on

a. Todd Patterson?

b. Edgar Patterson?

c. Betsy Sue Roughgarden Patterson?

d. Laboratory Disposable Products:

RESPONSE:

a. Yes.

b-d. Defendant objects to subparts b-d of Interrogatory No. 23 as overbroad, unduly burdensome and calling for information that is not relevant to this litigation or reasonably calculated to lead to the discovery of admissible evidence. Defendant further objects to disclosing names or other personally identifying information in contravention of the Privacy Act, 5 U.S.C. § 552a.

INTERROGATORY NO. 24:

Is it the practice of the FBI to investigate every person who:

1. sends mail to a foreign country?

2. receives mail from a foreign country?

A. Was the plaintiff's identity check founded upon

(i) the sending of mail to a foreign country or countries; or

(ii) the receipt of mail from a foreign country or countries; or

(iii) a different reason; if so, specify.

B. Is it the outgoing mail or incoming mail that typically triggers the investigation?

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C).

INTERROGATORY NO. 25:

What is the name of the individual and/or agency that is responsible for intercepting Todd Patterson's mail, which eventually led to agent Butenschoen's visit to Todd Patterson's home?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for the release of information which is protected from disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C).

INTERROGATORY NO. 26:

What is the name of the individual and/or agency that informed the FBI of the plaintiff's correspondences, which

eventually led to agent Butenschoen's visit to Todd Patterson's home?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for the release of information which is protected from disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C).

INTERROGATORY NO. 27:

What is the name of the individual and/or specific department of the FBI that received the information from the individual in Interrogatory #26?

RESPONSE:

Defendant objects to this interrogatory as it calls for the release of information which is protected from disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C).

INTERROGATORY NO. 28:

What is the name of the individual and/or agency that is responsible for intercepting Todd Patterson's mail from 1983 to the present?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for the release of information which is protected from

disclosure as privileged pursuant to the military state secrets and investigatory files privilege and which is exempt from disclosure under the FOIA pursuant to Exemptions 1 and 7(C). 5 U.S.C. § 552(b)(1), (7)(C).

INTERROGATORY NO. 29:

Has there been any wiretap or other interception conducted on the Patterson telephone at any time?

RESPONSE:

Defendant objects to this interrogatory as overbroad, unduly burdensome and calling for the release of information which is protected from disclosure as privileged pursuant to the military state secrets and investigatory files privileges and which is exempt from disclosure under the FOIA pursuant to FOIA Exemptions 1 and 7(C). 5 U.S.C. §

552(b)(1), (7)(C).

INTERROGATORY NO. 30:

Identify by name and position each person who provided information to answer these Interrogatories.

RESPONSE:

1. Philip W. Thomas
   Special Agent, FBI

2. David R. Lieberman
   Special Agent, FBI

3. Storm Watkins
   Special Agent, FBI

4. Robert Del Grosso
   Special Agent, FBI

5. Vernon Thornton
   Special Agent, FBI

I declare under penalty of perjury that the foregoing responses are true and correct to the best of my knowledge, information or belief.

DAVID R. LIEBERMAN
Supervisory Special Agent
FBI Headquarters
Washington, D.C.

PHILIP W. THOMAS
Supervisory Special Agent
FBI Headquarters
Washington, D.C.

Respectfully submitted,

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OF COUNSEL:

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Room 3648
Washington, D.C. 20535

0817Y/P1

CERTIFICATE OF SERVICE

I, the undersigned secretary in the Office of the United States Attorney for the District of New Jersey, Newark, New Jersey, hereby certify that I served a copy of the within documents upon the following party by mailing same first class mail on the 16th day of September, 1988:

Frank Askin, Esq.
Constitutional Litigation
Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102

I certify under penalty of perjury that the foregoing is true and correct.

_____

Alana B. Hoy

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TODD PATTERSON, a minor under 18, suing by his father, EDGAR PATTERSON, Plaintiff,	: Civil Action No.
vs.	:
FEDERAL BUREAU OF INVESTIGATION, JOHN DOE, an unknown employee of the United States Government, and JOHN DOE AGENCY, an unknown agency of the United States Government Defendants.	: COMPLAINT

JURISDICTION

1. This is a civil action for injunctive relief and damages, arising under the Freedom of Information Act, 5 U.S.C. Sec. 552, the Privacy Act, 5 U.S.C. Sec. 552a, 18 U.S.C. Sec. 1702, 19 U.S.C. Sec. 482 and the First Amendment to the United States Constitution. Jurisdiction is conferred on this Court by Title 5 U.S.C. Sec. 552(a)(4)(B) and Title 28

U.S.C. Sec. 1331 and Article III of the Constitution.

PARTIES

Plaintiff

2. Plaintiff Todd Patterson, a minor under 18 years of age, suing by his next friend and father, Edgar Patterson, is a student at Don Bosco Preparatory School. He is and, at all times relevant hereto, was a citizen of the United States.

Defendants

3. The Federal Bureau of Investigation, headquartered in Washington, D.C., is responsible for the collection and maintenance of records regarding the plaintiff.

4. John Doe, an unknown employee of the United States government, who intercepted and opened plaintiff's mail without obtaining his consent.

5. John Doe Agency, an unknown agency of the United States government and employer of defendant John Doe, is responsible for intercepting and opening plaintiff's mail without obtaining his consent.

GENERAL ALLEGATIONS

6. Plaintiff Todd Patterson, age 17, is a high school junior at Don Bosco Prep in Ramsey, New Jersey.

7. While a 6th grade elementary school student, Todd embarked on an ambitious project to write an encyclopedia of the world.

8. After exhausting the resources of a local library, he decided in early 1983 to write letters to all the countries of the world, requesting whatever information each country could provide him. Plaintiff wrote to 169 nations in total. Plaintiff

enclosed his information requests in envelopes bearing the return address of Laboratory Disposable Products, a business his parents operated from their home.

9. Plaintiff received information from most of the countries he wrote to, including the Soviet Union and other Communist countries.

10. Upon information and belief, the FBI first learned of plaintiff's overseas correspondence in July, 1983 from defendant John Doe Agency, an unknown agency of the United States government and employer of defendant John Doe, who had intercepted plaintiff's mail.

11. Sometime in the latter half of 1983, an agent of the FBI's Newark Field Office, John E. Butenschoen, appeared at the door of plaintiff's home in North Haledon, New Jersey. Agent Butenschoen was invited in by plaintiff's mother and

shown his room, to see his information.

12. As a result of Agent Butenschoen's investigation, an FBI memorandum was written on or about February 23, 1984. This memorandum describes Todd Patterson's activities in pursuit of his goal of writing an encyclopedia of the world.

13. From 1983 to the present, plaintiff has received at least fifty pieces of mail in damaged condition. Most of this mail has come from the Soviet Union. Some of this mail has arrived opened or devoid of contents. One envelope addressed to plaintiff from the Soviet Union was resealed and stamped "Received in damaged condition by the Postal Service." In this envelope was an envelope from Sweden addressed to a total stranger in Wayne, New Jersey. Plaintiff deposited this letter in a mail box

without opening it.

14. On or about January 5, 1984, plaintiff wrote to the Postmaster General to ask why he was receiving so much mail in damaged condition.

15. Theodore W. Troy, Director, Office of Mail Classification, replied by letter dated February 15, 1984 that the Postal Service had no explanation for the problem. Plaintiff Patterson has continued to receive mail in damaged condition.

16. Sometime during the summer of 1984, Todd Patterson received an invitation from the Soviet Mission in New York City. The invitation was extended to enable Todd to gather more information about the Soviet Union for his encyclopedia project. Concerned that the FBI was still monitoring his activities, Todd informed Agent Butenschoen of the

invitation. Butenschoen requested that Todd report back to him after the visit.

17. On or about September 3, 1984, Todd and his father, Edgar Patterson, visited the Soviet Mission. As requested, Todd reported to Agent Butenschoen the details of the visit.

18. Sometime during the spring of 1986, the plaintiff and his parents received information that gave them reason to fear that their telephone may have been tapped.

19. In early 1987, Todd Patterson learned that he could request access to any records the Federal Bureau of Investigation might be maintaining on him. Todd made a request to the FBI for release of records on or about May 28, 1987.

20. On or about August 12, 1987, Emil P. Moschella, Chief of the Freedom of Information-Privacy Acts Section of the

Records Management Division of the FBI responded to Todd Patterson's request. He explained that the FBI would not be releasing any of the records it maintained on plaintiff because the records were exempt from disclosure pursuant to 5 U.S.C. Section 552(b)(1) and 5 U.S.C. Section 552a(j)(2).

21. On or about August 20, 1987, plaintiff, by way of his father, Edgar Patterson, appealed the FBI's decision in a letter to the Department of Justice's Office of Information and Privacy.

22. On or about October 20, 1987, the Department of Justice denied plaintiff's appeal. Richard L. Huff, Co-Director of the Office of Information and Privacy, stated in a letter to Edgar Patterson that plaintiff Todd Patterson was "the subject of one Bureau main file and is alluded to briefly in one other file." Huff

explained that all of the material pertaining to Todd Patterson was classified and that access to it was being denied on the basis of 5 U.S.C. 552(b)(1). He further stated that the material on Todd Patterson was being referred to the "Department Review Committee for review and determination whether it warrants continued classification under Executive Order 12356."

23. On or about November 24, 1987, Richard Huff again wrote to Edgar Patterson. He explained that following review by the Department Review Committee, six pages of Patterson's file were being declassified. The remainder of the file "continues to be exempt from mandatory release on the basis of 5 U.S.C. 552(b)(1)." Along with his letter, Huff enclosed the six pages of declassified material, which were heavily excised.

(The six pages are appended hereto as Attachment A.)

24. One page of the released material states that "Todd is in the seventh grade ... criminal checks negative on subject. In view of the above, Newark contemplates no further investigation in this matter." Upon information and belief, this page of material was written sometime in early 1984.

25. Based on Richard Huff's letter of November 24, it is clear that the FBI continues to maintain records on plaintiff Todd Patterson.

26. Upon completion of his education, Todd Patterson hopes possibly to pursue a career with the State Department. He is concerned that his plans may be jeopardized by the FBI's continued maintenance of a file bearing his name that is marked classified in the interests

of national defense or foreign policy. Upon information and belief, whenever an individual applies for a government position that requires a security clearance, the FBI is asked to provide any files it maintains on that individual.

27. Todd Patterson poses no threat to national security or the national defense.

FIRST CAUSE OF ACTION

28. Plaintiff has exhausted his administrative remedies in seeking access to the documents requested from defendant FBI pursuant to the Freedom of Information Act, 5 U.S.C. Sec. 552(a)(6)(C).

29. The partial release of documents from plaintiff's file in the letter of November 24, 1987, is inadequate and has not rendered his original request moot as, by information and belief, he is still

being denied access to extensive material.

30. Plaintiff is entitled, pursuant to 5 U.S.C. Secs. 552(a) and 552(d) to inspect and copy the requested documents.

31. Plaintiff does not have a full and adequate remedy at law. Unless this court grants declaratory and injunctive relief to halt the activities described herein, irreparable injury will continue to be done to plaintiff.

WHEREFORE, plaintiff prays:

(A) that the Court order defendants to produce the requested documents to them for inspection and copying;

(B) that the Court provide for expeditious proceedings in this action pursuant to 28 U.S.C. Sec. 1657;

(C) that the Court award plaintiff costs and reasonable attorney fees; and

(D) that the Court grant such other relief as it may deem just and proper.

SECOND CAUSE OF ACTION

32. Section (e)(7) of the Privacy Act, 5 U.S.C. Sec. 552a, prohibits governmental agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment unless authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity."

33. Since 1984, defendant Federal Bureau of Investigation has maintained records describing how plaintiff exercised rights guaranteed by the First Amendment. Maintenance of such records continues.

34. Collection and maintenance of these records is not expressly authorized by statute.

35. Collection and maintenance of these records is not and never has been a

auuthorized by plaintiff.

36. Collection and maintenance of these records was and is not pertinent to or within the scope of an authorized law enforcement activity.

37. Defendant's maintenance of records on plaintiff is therefore in violation of the Privacy Act. Defendant's continued failure to abide by its provisions may jeopardize Todd Patterson's career plans.

38. Defendant's continued failure to comply with the Privacy Act is intentional and willful. In early 1984, defendant FBI concluded in a report compiled on plaintiff that no information had been developed to indicate that plaintiff posed a threat to anyone. In fact, the FBI contemplated discontinuation of the investigation.

WHEREFORE, plaintiff prays:

(A) that the Court enjoin the FBI from maintaining records which describe how plaintiff exercised rights guaranteed him by the First Amendment;

(B) award plaintiff damages consistent with the provision of the Privacy Act, 5 U.S.C. Sec. 552a(g)(4);

(C) award plaintiff costs and reasonable attorney fees; and

(D) grant such other and further relief as it may deem just and proper.

THIRD CAUSE OF ACTION

39. Plaintiff asserts that his mail has been illegally obstructed, surveilled, opened, read, and damaged from 1983 to the present by defendants in violation of plaintiff's rights under the First and Fourth Amendments to the U.S. Constitution.

40. Defendants' activities described

herein violate 18 U.S.C. Sec. 1702 which, inter alia, prohibits any person from obstructing the correspondence of another and from opening the mail of another in order to pry into his business.

41. Defendants' activities described herein violate 18 U.S.C. Sec. 482 which, inter alia, authorizes a seizure and search of an envelope at the border only when there is reasonable cause to suspect there is merchandise contained therein which is being imported contrary to law. Plaintiff has never received through the mail contraband or merchandise imported contrary to law.

42. Defendants' surveillance and conduct described herein constitute an unnecessary and unjustified interference with educational, expressive, and other constitutionally protected activities of plaintiff. Such investigation harasses

and penalizes plaintiff for exercising his First Amendment right to seek information and correspond freely, and has a chilling effect on other persons who will refrain from similar exercise of their rights for fear that permanent reports of their activities will be maintained and disseminated by the FBI.

43. Plaintiff does not have a full and adequate remedy at law. Unless and until this Court grants the relief sought to halt the activities described herein, irreparable injury will continue to be done to plaintiff.

WHEREFORE, plaintiff prays

(A) that the Court enjoin defendants from any obstruction and surveillance of plaintiff's mail;

(B) enjoin defendants from any surveillance and monitoring of plaintiff's activities in the exercise of rights

guaranteed by the First Amendment;

(C) order defendants to expunge any files, records, and all other information on plaintiff gathered as a result of these surveillance activities; and

(D) grant such other and further relief as it may deem just and proper.

Dated: 5/23/88

Frank Askin
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, New Jersey 07102
201-648-5687
Attorney for Plaintiff
On Behalf of the American
Civil Liberties Union of
New Jersey

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law...abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section (e) of the Privacy Act, Pub. L. 93-579, §3, 88 Stat. 1897 (1974), codified as amended at 5 U.S.C. §552a (1988) provides in relevant part:

> (e) Agency requirements
> each agency that maintains a system of records shall --
> (1) maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or by Executive Order of the President;
>
> ***
>
> (7) maintain no record describing how any individual exercises rights guaranteed by the first Amendment unless expressly authorized by statute or by the individual about whom the record is maintained or unless pertinent to and within the scope of an authorized law enforcement activity;

Rule 56, Federal Rules of Civil Procedure, provides in relevant part:

> (e) Form of Affidavits: Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in the affidavit shall be attached thereto or served therewith. The court may permite affidavits to be supplemented or opposed by depositions, answers to interrogatories, or futher affidavits....

(3)

No. 89-1731

Supreme Court, U.S.
FILED
JUL 9
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1990

TODD PATTERSON, PETITIONER

v.

FEDERAL BUREAU OF INVESTIGATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General

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Assistant Attorney General

DOUGLAS LETTER
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Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether a law enforcement agency complied with the Privacy Act in maintaining records relevant to an authorized investigation when that statute permits maintenance of records "pertinent to and within the scope of an authorized law enforcement activity * * *" (5 U.S.C. 552a(e)(7)).

2. Whether the courts below correctly found that they could resolve the merits of petitioner's Privacy Act claim in part on the basis of *in camera* review of materials showing that no violation occurred.

3. Whether petitioner's unsubstantiated claim of interference with his mail by an unknown government agent or agency was properly rejected.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-47a) is reported at 893 F.2d 595. The decision of the district court (Pet. App. 48a-113a) is reported at 705 F. Supp. at 1033.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1990. A petition for rehearing was denied on February 7, 1990. Pet. App. 130a-131a. The petition for a writ of certiorari was filed on May

8, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1983, petitioner, then an elementary school student, wrote to numerous foreign governments as part of an educational project. He enclosed much of his correspondence in envelopes bearing the return address of "Laboratory Disposable Products," a business operated by his parents. Pet. App. 4a-5a. The large amount of this international correspondence came to the attention of respondent Federal Bureau of Investigation (FBI) through classified means, and the agency opened an investigation. An FBI Special Agent visited petitioner's home and spoke to his mother and father, thereby learning the innocent nature of petitioner's correspondence. Pet. App. 5a.

After the Special Agent's visit to petitioner's home, the FBI changed the name of the relevant record in its internal files from "Laboratory Disposable Products" to "Todd Patterson," and described the nature of petitioner's project. The agency concluded that no further investigation was appropriate. Pet. App. 6a-7a.

In April 1987, petitioner requested from FBI headquarters copies of his "personal file" under the Freedom of Information Act (FOIA). Pet. App. 8a. The FBI responded in August 1987 that the information pertaining to him in FBI headquarters files was exempt from release pursuant to the FOIA and the Privacy Act, under provisions exempting classified material from disclosure. Pet. App. 58a-59a.

The Department of Justice reviewed the FBI's determination and assured petitioner that there was no derogatory material about him in the FBI files. C.A. App. 134. It also released in redacted form some of

the records, but the rest of the file remained classified. C.A. App. 136. The disclosed documents made clear that, once the FBI had determined the nature of petitioner's correspondence, it had no intention of continuing its investigation. C.A. App. 140-141. Petitioner subsequently presented a second FOIA request to the Newark FBI office. Pet. App. 8a-9a; Pet. App. 60a.

2. Petitioner filed this suit in May 1988 against the FBI and an unknown agency and employee of the United States. Petitioner complained that the FBI had failed to comply with the FOIA and the Privacy Act. Pet. App. 299a-303a. He also alleged that, since 1983, his mail had been illegally opened and damaged in violation of the First and Fourth Amendments and various statutory provisions. Pet. App. 303a-306a. Petitioner requested disclosure of his entire FBI file under the FOIA, damages and injunctive relief under the Privacy Act, an injunction against the claimed obstruction and surveillance of his mail by the government, and the expunging of any records gathered as a result of surveillance activities. Pet. App. 299a-306a.[1]

In response to the complaint, the government offered to expunge petitioner's name from its records. Pet. App. 10a. This offer has been repeated throughout the litigation, but has never been accepted by petitioner.

---

[1] Although petitioner's suit originally involved only the request made to FBI Headquarters in Washington, D.C., the parties and the district court treated petitioner's second FOIA request as part of the case too. The FBI responded to that request by releasing some further information, and withholding other material under the FOIA exemptions covering classified material and records whose release would violate privacy interests. See Pet. App. 60a.

Petitioner sought discovery from the government regarding FBI investigative activities, including information concerning the types and meanings of internal markings the FBI uses on its files; the content of files the government maintains on him, his parents, and their family business; the reason these files were created, and whether the FBI investigates those who engage in foreign correspondence; the way the FBI learned of his correspondence; and whether there had been any wiretap on the Patterson telephone.[2] See Pet. App. 255a-285a. Some of the information sought by Patterson was provided in answers to interrogatories and in affidavits by FBI Special Agents. See *ibid.* However, as to questions delving primarily into the counterintelligence investigative techniques of the FBI, the United States invoked the state secrets privilege against disclosure. Pet. App. 256a-264a, 273a, 280a-285a.

In support of its FOIA exemption claims regarding the FBI files, an FBI Special Agent affirmed that he had personally examined the withheld material and confirmed that it concerns intelligence sources and methods. C.A. App. 95-96. He also explained that proper classification procedures had been followed. C.A. App. 96-97. The Special Agent then described in considerable detail each of the documents that were withheld in whole or part, and the reasons for their non-disclosure. C.A. App. 98-117. He explained the harm resulting from disclosure of intelli-

[2] During the litigation, petitioner's mother asserted that, beginning in 1983, she had heard strange noises on her telephone. Pet. App. 247a. She also related that a now-deceased former employee had claimed in 1986 that he heard a voice on the Pattersons' business telephone line indicating that it was not the telephone that was meant to be "tapped." Pet. App. 249a.

gence sources and methods, as well as the internal FBI file markings. The FBI also declared that the agency's files did not indicate that the Patterson premises had ever been subject to electronic surveillance. An FBI Special Agent attested that the FBI files showed that the agency did not intercept or open any mail directed to the Pattersons. Pet. App. 16a-17a; C.A. App. 254-255.[3]

The government moved for summary judgment on petitioner's first and second causes of action, and moved to dismiss the third cause of action under Fed. R. Civ. P. 12(b)(2). Pet. App. 10a.

In December 1988, the district court ordered the government to submit in unredacted form certain of the documents at issue for an *in camera* inspection so that the court could "assure itself that the FBI has acted in good faith with regard to its investigation of [petitioner], that the FBI complied with all relevant government regulations, and that the FBI engaged in no illegal conduct." Pet. App. 115a. In response, the government submitted for *in camera* inspection *all* of the unredacted documents at issue, an additional explanatory declaration by James Geer, the FBI Assistant Director then in charge of the Intelligence Division, and a Declaration and Claim of Privilege from the Attorney General.[4]

---

[3] In addition, the government told petitioner that the FBI had not supplied information regarding him to any individual or agency. Pet. App. 277a. The government also stated without equivocation that no investigation or inquiry regarding petitioner had been conducted after a Special Agent visited petitioner's home and discovered the innocent nature of his project. Pet. App. 278a.

[4] The Attorney General declared that he had "personally determined that [the information at issue], if disclosed, could damage the national security of the United States." C.A.

After conducting an *in camera* inspection of the documents and the Geer declaration, the district court granted judgment in favor of the government on all three of petitioner's causes of action. Pet. App. 48a-113a. The court found first that proper procedures were followed in classifying the material at issue (Pet. App. 69a) and confirmed that the "withheld material, read in conjunction with the Greer [*sic*] affidavit, does establish a logical connection between each withheld or redacted document and the risk that certain intelligence methods or sources would be compromised if the withheld material was released." Pet. App. 75a-76a.[5] Noting that "[a]t first blush, the investigation appears ludicrous," the district court found that the circumstances of petitioner's mailings could be expected to prompt the FBI to investigate the matter "using properly classified intelligence sources and methods." Pet. App. 78a. The court concluded that the subject files were properly exempted from disclosure under the FOIA.

App. 299. The Attorney General cautioned that damage to the national security can reasonably be expected to occur even when "isolated segments" of intelligence information are revealed because such segments can be collected over time and combined so as to make possible identification of intelligence sources, methods, and activities. C.A. App. 300.

[5] The court found no evidence of agency bad faith, noting that the allegations concerning damaged mail did not create a genuine factual issue of whether any United States agency interfered with this mail: "[t]he distance the mail traveled, the size and content of the envelopes, and the national origin of the mail are the far more likely culprits in assessing why [petitioner's] mail may have arrived in damaged condition. Also, [petitioner's] allegation of electronic eavesdropping is not substantiated by any substantive, credible or admissable evidence * * *." Pet. App. 77a-78a.

The district court next determined (Pet. App. 89a) that the FBI had acted properly under the Privacy Act if it could show that the records it maintained on petitioner were "pertinent to and within the scope of an authorized law enforcement activity." 5 U.S.C. 552a(e)(7). The district court ruled that this statutory language is met where the facts demonstrate that all records maintained regarding an individual's exercise of First Amendment rights are "*relevant* to an authorized law enforcement activity of the agency, and that there exists a sufficient basis for the maintenance of such records." Pet. App. 93a-94a (emphasis in original).

The district court determined that the *in camera* Geer declaration established such a connection. Pet. App. 97a. The court noted that the FBI could not know prior to its investigation that petitioner was involved in nothing illegal or clandestine, but that the agency was able to determine this fact through an investigation "in the least intrusive means possible given the circumstances." Pet. App. 97a-98a.[6]

The district court next found no merit to petitioner's First Amendment claim, finding as a matter of fact that a review of the record as a whole made clear that the FBI and any government employees acted in accord with all applicable statutory and

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[6] The district court advised petitioner "that any records maintained by the FBI on him do not reflect negatively on his character or conduct. Accordingly, [it] * * * assure[d] [him] that the law enforcement activity conducted by the FBI in this case should not in any way inhibit him from pursuing any legitimate exercise of his First Amendment rights, including writing letters to countries throughout the world. Furthermore, [petitioner's] fear of an aborted or limited public service career arising out of these events is misplaced." Pet. App. 99a-100a.

regulatory guidelines and that such action did not impermissibly chill petitioner's First Amendment rights. Pet. App. 104a-107a.

The court also rejected petitioner's Fourth Amendment claim that some government agency had improperly opened his mail. Pet. App. 107a. The court found that the public record and its *in camera* review showed that the FBI had conducted no illegal searches, and that the Attorney General had properly invoked the state secrets privilege to defeat petitioner's attempt to trawl for evidence of wrongdoing by some other unknown federal agency. Pet. App. 107a-109a. Similarly, the court found no evidence of governmental violation of statutes prohibiting interference with the mails, and confirmed that petitioner's discovery attempts on this point also were precluded by the state secrets privilege. Pet. App. 110a-111a.

Shortly after the district court's ruling, petitioner sought reconsideration, arguing that the court had erred in relying on the government's *in camera* submissions. On March 30, 1989, the court denied this motion, noting that the FOIA specifically provides for *in camera* submissions (5 U.S.C. 552(a)(4)(B)) and that numerous federal courts have relied upon *in camera* procedures in cases involving the FOIA, the Privacy Act, and claims of the state secrets privilege. Pet. App. 126a-129a.

3. The Third Circuit unanimously affirmed the ruling by the district court after itself conducting an *in camera* inspection of the documents at issue. During the appellate proceedings, government counsel repeated the offer to expunge petitioner's name from the files, and reiterated to the court of appeals that the FBI has no interest whatsoever in petitioner but was defending this litigation in order to protect a

valuable intelligence source or method. See, *e.g.*, Pet. App. 10a n.5; C.A. Tr. 27-29.

The court of appeals first held that the district court had followed proper procedures in conducting an *in camera* review because "the public submissions represent a good faith effort by the FBI to provide as much access to the information as possible." Pet. App. 19a-20a. The appellate court also agreed that the record showed that the FBI had correctly followed classification procedures here (Pet. App. 23a) and had withheld classified material properly under the exemptions provided by the FOIA (Pet. App. 26a-29a).[7]

After reviewing decisions by four other circuits, the Third Circuit confirmed the conclusion that no Privacy Act violation had occurred as a result of the FBI's creation and maintenance of files here. The court held that the FBI had made the necessary showing that "[its] records * * * on [petitioner's] exercise of First Amendment rights are relevant to an authorized law enforcement activity of the FBI." Pet. App. 34a-38a.

Reaching petitioner's third cause of action, the Third Circuit noted that the district court had concluded that the FBI and all FBI and government employees had acted in accord with all statutory, regulatory, and administrative guidelines, and that the invocation of the state secrets privilege prevented further discovery regarding the intelligence source and method at issue. Pet. App. 38a-43a. The court of appeals held that the district court had committed a harmless procedural error on this point by treating

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[7] The court of appeals also assured petitioner that there is nothing in the FBI files that is in any way derogatory. Pet. App. 26a n.10.

the government's motion to dismiss for lack of personal jurisdiction as one for summary judgment. Treating the jurisdictional question as one that implicated the merits of the case as well, the court of appeals confirmed that, because the record contains no evidence of abuse by the FBI and the state secrets privilege prevents further discovery, dismissal of the case was appropriate. Pet. App. 44a-46a.

ARGUMENT

After reviewing *in camera* the documents at issue and explanatory declarations, both courts below have found that petitioner has no cause of action here; no judge has dissented from this determination. Rather, all of the judges below have concluded that the government has acted properly in conducting its limited investigation of the unique facts of this case and then protecting a valuable intelligence source or method. This ruling is correct and is fully consistent with numerous holdings of other courts. Review by this Court is plainly unwarranted.

1. Petitioner first contends (Pet. 16-40) that the court of appeals applied 5 U.S.C. 552a(e)(7) of the Privacy Act in a manner that undermines Congress's intent in enacting the provision and conflicts with the interpretations of other circuits. His contention is without merit.

a. The Third Circuit determined that the FBI had complied with the Privacy Act because maintenance of the records here was "relevant to an authorized law enforcement activity of the agency." Pet. App. 37a.[8] That interpretation accords with the plain lan-

[8] The "law enforcement" language of Section 552a(e)(7) encompasses more than simple investigation of criminal activity, also covering authorized intelligence investigations. See

guage of Section 552a(e)(7), which prohibits federal agencies from maintaining records "describing how any individual exercises rights guaranteed by the First Amendment * * * unless [the records are] *pertinent to and within the scope of* an authorized law enforcement activity" (emphasis added).[9]

The legislative history supports a straightforward reading of the statutory text. The proposed version of Section 552a(e)(7) was amended on the House floor to clarify that "such activities as are pertinent to, and within the scope of, duly authorized law enforcement activities are not meant to be excluded by the broad terms" of the section. 120 Cong. Rec. 36,957 (1974) (Rep. Ichord). The House report on Section 552a(e)(7) indicated that federal agencies were not to maintain records concerning "the political or religious beliefs or activities of any individual," unless authorized by statute. H.R. Rep. No. 1416, 93d Cong., 2d Sess. 16, 25 (1974). In addi-

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Jabara v. *Webster*, 691 F.2d 272, 280 (6th Cir. 1982), cert. denied, 464 U.S. 863 (1983).

[9] Petitioner notes (Pet. 26-28) that the standard established by Section 552a(e)(7) of the Act, which limits collection of information concerning First Amendment activities, should be more rigorous than that established by Section 552a(e)(1), which limits information generally collected by agencies. The Third Circuit's standard is not at odds with this: information collected under Section 552a(e)(7) must be relevant to "an authorized law enforcement activity"; information can be collected under Section 552a(e)(1) as long as it is relevant and necessary to accomplish, more broadly, "a purpose of the agency" set by statute or executive order. (Additionally, no records may be kept if they violate Section 552a(e)(7) even if they are not a part of an agency's "system of records"; they may be kept under Section 552a(e)(1) if they are not incorporated into the agency's "system of records." See, *e.g.*, *Clarkson* v. *IRS*, 678 F.2d 1368, 1373-1377 (11th Cir. 1982).)

tion, the Senate report on the provision that became Section 552a(e)(7) makes clear the limited purpose that Congress had in mind, noting that "[t]his section's restraint is aimed particularly at preventing collection of protected information not immediately needed, about law-abiding Americans, on the off-chance that the Government or the particular agency might possibly have to deal with them in the future." S. Rep. No. 1183, 93d Cong., 2d Sess. 56-57 (1974).

The courts below correctly found that the FBI actions here do not in any sense fit within the activity proscribed by Congress. This was not an instance of the agency monitoring a political program or activity; rather, the FBI conducted a highly limited investigation of specific action for authorized counterintelligence purposes.[10] As the record demonstrates, that investigation was quickly terminated when the innocent nature of petitioner's activity was learned, something that could not have been discovered without at least some inquiry. And, even though we have offered to expunge petitioner's name from the FBI files, maintenance[11] of the files serves an innocuous and valuable purpose. Since petitioner has kept up his correspondence with foreign governments (see Pet. 3-4), the existing files enable the agency to de-

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[10] The FBI's counterintelligence activity here was authorized under 28 U.S.C. 533 and Section 1.14 of Exec. Order No. 12,333, 3 C.F.R. 200 (1981 comp.) (*reprinted at* 46 Fed. Reg. 59,949 (1981)).

[11] Petitioner's claim (Pet. 28-31) that there exists a circuit conflict regarding the treatment of the "collection" as opposed to the "maintenance" of records under Section 552a(e)(7) is erroneous. Neither *MacPherson* v. *IRS*, 803 F.2d 479, 483-485 (9th Cir. 1986), nor *Albright* v. *United States*, 631 F.2d 915 (D.C. Cir. 1980), distinguished the standard to be applied to the two activities in analyzing Section 552a(e)(7).

termine immediately that no investigation is necessary or appropriate as petitioner's name comes to its attention through the same types of intelligence sources and methods which raised it originally.[12]

b. Contrary to petitioner's claim (Pet. 36-40), the Third Circuit's ruling is fully consistent with applications of Section 552a(e)(7) by other circuits. While describing the inquiry under Section 552a(e)(7) in slightly varying terms, the circuits appear to agree on what conduct is prohibited; each circuit would find the FBI's conduct here proper. In addition, each would reject the extremely stringent standard suggested by petitioner in the courts below that an agency cannot even maintain a file unless there is a "reasonable suspicion, based on specific and articulable facts" that the subject has committed or is about to commit a crime. See Pet. C.A. Br. 20.

Thus, in *Clarkson* v. *IRS*, 678 F.2d 1368, 1375 (1982), the Eleventh Circuit remanded a case for a determination whether the IRS had violated Section 552a(e)(7) by "engag[ing] in the practice of collecting protected information, unconnected to any investigation of past, present or anticipated violations of the statutes" which it is authorized to enforce. On remand, the district court found that the collection was permissible under Section 552a(e)(7), and this determination was upheld on appeal because the record supported the findings that the documents

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[12] Disposal of FBI records is also regulated in order to assure that materials of historical import are not destroyed, as required by the U.S. District Court for the District of Columbia. See *American Friends Service Comm.* v. *Webster*, 485 F. Supp. 222 (1980), and Civ. No. 79-1655 (Sept. 8, 1986). According to the FBI Records Retention Plan and Disposition Schedule, records are destroyed after established retention periods or are transferred to the National Archives.

maintained by the IRS "are related to investigations of illegal tax protester activities * * * [and were] in connection with legitimate law enforcement activities." *Clarkson* v. *IRS*, 811 F.2d 1396, 1397 (11th Cir.), cert. denied, 481 U.S. 1031 (1987).

The Sixth Circuit has also adopted a "relevancy" test, ruling that the government acts properly under Section 552a(e)(7) so long as its "investigation is relevant to an authorized criminal investigation or to an authorized intelligence or administrative one." *Jabara* v. *Webster*, 691 F.2d 272, 279-280 (1982), cert. denied, 464 U.S. 863 (1983); accord *Nagel* v. *Department of HEW*, 725 F.2d 1438, 1441 n.3 (D.C. Cir. 1984). The formulations of the Eleventh and the Sixth Circuits, like the Third Circuit's "relevancy" standard, all require that the government collect only information connected to legitimate law enforcement objectives. The conduct of the FBI here, an authorized counterintelligence investigation, would satisfy each circuit's formulation.

The Ninth Circuit in *MacPherson* v. *IRS*, 803 F.2d 479, 481-484 (1986), declined to formulate any one standard, emphasizing that each case entails balancing the need to avoid chilling the exercise of First Amendment rights against the need to conduct surveillance and recording of a wide range of activities, including some protected by the First Amendment. The court then approved the surveillance and recording of information concerning an individual "not suspected * * * of any past, present, or anticipated illegal conduct" (*id.* at 480) because that individual spoke at tax protester conferences. Thus, although its standard remains unarticulated, the Ninth Circuit evidently would not find the conduct at issue here unlawful because it generated information about an individual not suspected of criminal activity. There

is no need for this Court's intervention at this time, since the circuits appear to be reaching a consensus on the type of conduct permissible under Section 552a(e)(7).[13]

2. Petitioner next contends (Pet. 40-48) that the courts below violated principles of due process and Fed. R. Civ. P. 56 by relying in part on the *in camera* material to resolve petitioner's Privacy Act claim. He also asserts (Pet. 48-54) that there is a conflict among the circuits on the question whether a court can grant summary judgment based on such *in camera* procedures. Neither contention has merit.

a. The federal courts have approved use of *in camera* proceedings to resolve issues in a variety of contexts, and to rule finally on both constitutional and statutory claims. See, *e.g.*, *Molerio* v. *FBI*, 749 F.2d 815, 824-826 (D.C. Cir. 1984); *Pollard* v. *FBI*, 705 F.2d 1151, 1153-1154 (9th Cir. 1983); *Salisbury* v. *United States*, 690 F.2d 966, 973 n.3 (D.C. Cir. 1982); *Stein* v. *Department of Justice*, 662 F.2d 1245, 1255-1256 (7th Cir. 1981); *Farnsworth Cannon, Inc.* v. *Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc).

It is well established that such studied use of *in camera* documents does not violate the Due Process Clause. Thus, while this Court recently noted that the "routine use" of *in camera* procedures could raise

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[13] Petitioner also asserts the relevance of *Paton* v. *LaPrade*, 524 F.2d 862 (3d Cir. 1975). That case held that certain actions by the FBI could have violated the constitutional and statutory rights of an individual, entitling her to the expunging of her FBI file. The conduct at issue in that case predated the enactment of the Privacy Act, and did not involve an inquiry into the legitimate law enforcement actions of an agency. In any event, petitioner's attempts to establish an intra-circuit conflict do not warrant this Court's attention. See *Wisnewski* v. *United States*, 353 U.S. 901, 902 (1957).

due process concerns, it confirmed the "sound discretion" of the district courts to conduct *in camera* review when warranted to establish a claim of privilege. *United States* v. *Zolin*, 109 S. Ct. 2619, 2630, 2631 (1989); see also *EPA* v. *Mink*, 410 U.S. 73, 92-93 (1973) (discussing propriety of *in camera* proceedings in FOIA case).

Indeed, Congress in the FOIA explicitly authorized *in camera* procedures as the courts rule on the *merits* of a requester's statutory claim. See 5 U.S.C. 552(a)(4)(B). Accord S. Rep. No. 854, 93d Cong., 2d Sess. 16 (1974) ("in some cases of a particularly sensitive nature [a court may] decide to entertain an ex parte showing by the government"); S. Conf. Rep. No. 1200, 93d Cong., 2d Sess. 9 (1974) ("[w]hile *in camera* examination need not be automatic, in many situations it will plainly be necessary and appropriate"). No court has held that this part of the FOIA is unconstitutional because due process prohibits resolution of the merits of a statutory claim through *in camera* proceedings. See *Arieff* v. *Department of the Navy*, 712 F.2d 1462, 1469 (D.C. Cir. 1983) (FOIA *in camera* review provision was merely a statutory confirmation of a power that the courts already possessed); see, *e.g.*, *Pollard*, 705 F.2d at 1153-1154 (resolving summary judgment motion).

Likewise, a claim of state secrets privilege is frequently considered *in camera*. See *United States* v. *Reynolds*, 345 U.S. 1, 10 (1953); see, *e.g.*, *Farnsworth Cannon*, *supra*. The privilege requires dismissal when it rebuts a plaintiff's prima facie case or when the action cannot be litigated without exposing the privileged information. See *Molerio*, 749 F.2d at 825; *Halkin* v. *Helms*, 690 F.2d 977, 997-1001 (D.C. Cir. 1982); *Farnsworth Cannon*, 635 F.2d at 281.

Resolution of Privacy Act claims often raises similar concerns about the disclosure of highly sensitive information and interests of national security; courts have therefore allowed Privacy Act claims to be determined on their merits on the basis of *in camera* review of documents. See *Molerio*, 149 F.2d at 825-826 (privileged material reviewed *in camera* to resolve summary judgment motion); *Jabara*, 691 F.2d at 274, 280 (use of *in camera* material approved; left to district court discretion on remand). Like the other cases involving national security and privacy claims, these cases present unique demands: a court can neither disclose the very information sought to be protected nor punish the government for protecting the public interest by keeping sensitive information secret. Rather, "courts have been charged with the responsibility of deciding the dispute without altering [the] unequal condition [that one party does not know the content of the withheld material], since that would involve disclosing the very material sought to be kept secret. The task can often not be performed by proceeding in the traditional fashion, so that [the *ex parte, in camera* procedure that] * * * is a rarity among our cases generally must become a commonplace in this unique field," *Arieff*, 712 F.2d at 1471.

b. Contrary to petitioner's contention (Pet. 48-51), the Third Circuit's ruling does not conflict with *Association for Reduction of Violence* v. *Hall*, 734 F.2d 63 (1st Cir. 1984). *Hall* did not involve the Privacy Act; it concerned a ruling resolving the merits of a cause of action brought under 42 U.S.C. 1983 alleging a retaliatory transfer of prisoners for First Amendment protected activity. The court of appeals held that summary judgment could not be premised on material covered by qualified privileges

of nondisclosure. See also *Bane* v. *Spencer*, 393 F.2d 108, 109 (1st Cir. 1968) (similar Section 1983 suit), cert. denied, 400 U.S. 866 (1970). Unlike this case and those cited above, *Hall* did not involve the special circumstances present in cases involving national security material and claims of the state secrets privilege.[14]

3. Finally, petitioner asserts (Pet. 54-64) that the courts below erred in dismissing his third cause of action, claiming that some unknown federal agent or agency had violated his First and Fourth Amendment rights by interfering with his mail.

Petitioner states (Pet. 55-56) that his allegations established that a government agent had intercepted his mail and had informed the FBI, and that his foreign incoming mail has regularly been tampered with. However, there is no evidence in the record of any kind showing, or even tending to show, that any government agent or agency has tampered with petitioner's incoming mail.[15]

To the contrary, the district court found (Pet. App. 77a, 109a-111a) that the *in camera* materials indicated that the FBI had not illegally interfered with petitioner's mail. The government's proper claim that the *in camera* material was exempt from discovery under the FOIA and the state secrets priv-

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[14] Thus, since *Hall*, the First Circuit itself has indicated that, while public affidavits and filings are preferred, *in camera* proceedings may be used to resolve the merits of FOIA cases. See *Curran* v. *Department of Justice*, 813 F.2d 473, 477 (1987).

[15] As the district court noted, "[t]he distance the mail traveled, the size and content of the envelopes, and the national origin of the mail are the far more likely culprits in assessing why [petitioner's] mail may have arrived in damaged condition." Pet. App. 77a-78a.

ilege prevents release of that material or further discovery into its content. See, *e.g.*, *Molerio*, 749 F.2d at 825-826; *Halkin*, 690 F.2d at 997-1001; *Farnsworth Cannon*, 635 F.2d at 281; see also *Weinberger* v. *Catholic Action*, 454 U.S. 139, 146-147 (1981). Significantly, petitioner does not challenge the validity of the state secrets privilege assertion. Consequently, petitioner's third cause of action was properly rejected, because petitioner has not shown that any government agency violated his rights, and is barred from taking discovery in order to attempt to back up his otherwise unsupported claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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